Supreme Court, U.S.
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No. 88-212

In The

Supreme Court of the United States

October Term, 1988

ROBERT W. HALL,

Appellant,

v.

STATE OF HAWAII, UNIVERSITY OF HAWAII, THE WILLIAM S. RICHARDSON SCHOOL OF LAW, ALBERT J. SIMONE, STEPHEN G. BESS, GLADYS A. BRANDT, GREGORY DELA CRUZ, JULIA FROHLICH, ROBERT M. FUJIMOTO, JAMES G. GARY, DANIEL M. ISHII, KENNETH N. KATO, STANLEY Y. MUKAI, WALTER R. STEIGER, BURT S. TSUCHIYA, ROBIN CAMPANIANO, MARVIN J. ANDERSON, RICHARD S. MILLER, JUDITH M. KIRKENDALL, WILLIAMSON B.C. CHANG, IRENE RYPINSKI, LAWRENCE H. KAM, BODE UALE, WILLIE DOMINGO, DEAN KAUKA, JEREMY T. HARRISON, JAMES H. DANNENBERG, RONALD C. BROWN, AND JOHN E. PICKRON,

Appellees.

ON APPEAL FROM THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether appellant has properly invoked this Court's mandatory appellate jurisdiction under 28 U.S.C. § 1257(2) when, rather than drawing in question on federal grounds the validity of a state statute, appellant challenges the application of preclusion arising out of a federal judicial decree, *i.e.*, *Hall v. State*, 791 F.2d 759 (9th Cir. 1986) ("*Hall I*")?

2. Whether, assuming the above does not bar review, appellant may obtain review of claimed federal constitutional improprieties in the state court's disposition of federal preclusion defenses when such claimed wrongs were not timely raised in or passed upon by the lower state courts in the case?

3. Whether, assuming the papers whereon appeal was taken may be treated as a petition for certiorari, or mandatory appellate jurisdiction exists despite the foregoing, the Court lacks jurisdiction under the independent and adequate state ground doctrine or under the Constitution's Eleventh Amendment?

4. Whether, assuming the above do not bar review, any substantial question is presented by a state court's application of the doctrine of federal merger and bar and collateral estoppel when (a) claims arising under federal law, and upon which state law provides no greater protection, were decided on their merits in the prior federal proceeding; (b) claims arising under state law against the defendants in the prior proceeding in their individual capacities and arising out of the identical set of transactions were not dismissed pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966); (c) the present federal and state claims arise in a factual context that is materially identical to that presented in the prior federal action; and (d) all defendants in the present state court proceeding are in privity with those in the earlier filed federal action?

5. Whether, even assuming appellant has properly alleged error in the state court's application of federal preclusion principles, appellant on the record developed in the state court has standing or is able to show prejudicial error in light of numerous alternative grounds for affirming the judgment, including, but not limited to, the facial defects in appellant's state court complaint, the undisputed record on summary judgment, and the recent decision of

the Supreme Court of Hawaii adverse to appellant in *State of Hawaii v. Hall*, No. 12636?*

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* Appellant, who appears pro se, is a 53 year-old white male resident of the State of Hawaii who applied in admission years 1984-86 to the William S. Richardson School of Law at the University of Hawaii at Manoa, an agency of the State of Hawaii. See Haw. Rev. Stat. §§ 304-5, 304-6, 304-62 (1985). Appellees in this appeal include the State of Hawaii, the University of Hawaii, the School of Law, and twenty-six University officers and student members of the admission committees of the School of Law named in their official and individual capacities. *See Kentucky v. Graham*, 473 U.S. 159, 165-168 (1985). The officials and student committee members include Albert J. Simone, President of the University of Hawaii since August 8, 1985, and Acting President since June 1, 1984; Stephen G. Bess, Gladys A. Brandt, Gregory Dela Cruz, Julia Frohlich, Robert M. Fujimoto, James G. Gary, Daniel M. Ishii, Kenneth N. Kato, Stanley Y. Mukai, Walter R. Steiger, Burt S. Tsuchiya, and Robin M. Campaniano, members at various times of the Board of Regents of the University of Hawaii; Marvin Anderson, at various times the Chancellor of the University of Hawaii at Manoa; Richard S. Miller, Dean of the School of Law in admission year 1984; Judith Kirkendall, Registrar at various times for the School of Law, Williamson B.C. Chang and Irene Rypinski, members of the School of Law faculty and admissions committee in admission year 1984; Lawrence H. Kam, Assistant Dean and member of the admissions committee in admissions years 1984-86; Ronald C. Brown and John E. Pickron, members of the faculty and admission committee in admission years 1985-86; Bode Uale, Willie Domingo, and Dean Kauka, students at the School of Law and members of the admission committee in admission year 1984; Jeremy T. Harrison, acting Dean of the School of Law in admission year 1985, and Dean of the School of Law in admission year 1986; and James H. Dannenberg, Deputy Attorney General and later First Deputy Attorney General through about May 1986, who acted as co-defense counsel for defendants in *Hall I* up until his appointment as a District Judge for the District of Honolulu, State of Hawaii, and resignation from the Department of the Attorney General.

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ROBERT W. HALL,

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STATE OF HAWAII, UNIVERSITY OF HAWAII, THE WILLIAM S. RICHARDSON SCHOOL OF LAW, ALBERT J. SIMONE, STEPHEN G. BESS, GLADYS A. BRANDT, GREGORY DELA CRUZ, JULIA FROHLICH, ROBERT M. FUJIMOTO, JAMES G. GARY, DANIEL M. ISHII, KENNETH N. KATO, STANLEY Y. MUKAI, WALTER R. STEIGER, BURT S. TSUCHIYA, ROBIN CAMPANIANO, MARVIN J. ANDERSON, RICHARD S. MILLER, JUDITH M. KIRKENDALL, WILLIAMSON B.C. CHANG, IRENE RYPINSKI, LAWRENCE H. KAM, BODE UALE, WILLIE DOMINGO, DEAN KAUKA, JEREMY T. HARRISON, JAMES H. DANNENBERG, RONALD C. BROWN, AND JOHN E. PICKRON,

Appellees.

ON APPEAL FROM THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

Appellees, in their respective capacities, pray that this Court dismiss this appeal for want of jurisdiction, or for want of a properly presented or substantial federal question, or that the Court affirm the judgment below. If

the Court treats the papers whereon appeal is taken as a petition for certiorari to review the judgment of the Intermediate Court of Appeals entered May 26, 1988, appellees further pray that certiorari be denied.

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OPINIONS INVOLVED

The opinion of the Intermediate Court of Appeals of the State of Hawaii in appeal No. 11992 (*"Hall II"*) is reported at 756 P.2d 1048 (Haw. App. 1988), and is reprinted in the Appendix to the Jurisdictional Statement ("J.S. App.") 1. The order of the Supreme Court of Hawaii denying appellant's Application for Writ of Certiorari is not reported and is reprinted at J.S. App. 20. The order of the Circuit Court for the First Circuit of the State of Hawaii of which review was sought in the state court proceedings below is not reported and is reprinted in Appendix "A" to the Motion to Dismiss or Affirm ("Motion App.").

The unappealed judgment of the United States Court of Appeals for the Ninth Circuit in appeal No. 85-1698 (*"Hall I"*), is reported at 791 F.2d 759 (9th Cir. 1986), and is reprinted at J.S. App. 26. The order of the United States District Court for the District of Hawaii in Civil No. 84-1072, from which *Hall I* arose, is not reported and is reprinted at J.S. App. 22.

The judgment of the Supreme Court of Hawaii in appeal No. 12636 (Haw. Aug. 18, 1988) (*"Hall III"*) is not reported and is reprinted in Motion App. "D."

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JURISDICTION

The judgment of the Intermediate Court of Appeals of the State of Hawaii was entered on May 26, 1988, and a timely filed application for writ of certiorari was denied by the Supreme Court of Hawaii on June 13, 1988. The jurisdictional statement was timely filed on August 4, 1988. Although this appeal is not barred by the terms of Pub. L. No. 100-352, 102 Stat. 662, this case is without this Court's jurisdiction for numerous reasons relating to, *inter alia*, the limits on the authority conferred by 28 U.S.C. § 1257, Article III, and the Eleventh Amendment. These jurisdictional matters are briefed below.

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article III, section 2, clause 1 of the United States Constitution provides in relevant part:

> The Judicial Power [of the United States] shall extend to . . . Cases . . . [and] to Controversies . . . .

Section 1257 of Title 28, United States Code, provides in relevant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of

> its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, . . . where any title right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Although no state statute, regulation, or rule, has been properly drawn in question within the meaning of 28 U.S.C. § 1257, the following provisions of Hawaii law are relevant to the preclusion issues presented by the instant appeal, and are reprinted for the convenience of the Court and appellant.

Article I, § 5 of the 1978 Hawaii Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry.

Article I, section 6 of the 1978 Hawaii Constitution provides:

> The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

Article I, section 8 of the 1978 Hawaii Constitution provides:

> No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.

Article X, section 1 of the 1978 Hawaii Constitution provides:

> The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefor. There shall be no discrimination in public educational institutions because of race, religion, sex or ancestry; nor shall public funds be appropriated for the support or benefit of any sectarian or private institution.

Section 378-2(1) of the Hawaii Revised Statutes (1985) provides:

> It shall be an unlawful discriminatory practice: (1) For any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment because of race, sex, age, religion, color, ancestry, physical handicap, marital status, or arrest and court record.

Sections 480-2, 480-3, and 480-4, of the Hawaii Revised Statutes (1985) provide in selected part:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.
>
> This chapter shall be construed in accordance with judicial interpretations of similar federal antitrust statutes.
>
> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State, or in any section of this State is illegal.

———o———

STATEMENT OF THE CASE

1. This case arises out of efforts of the William S. Richardson School of Law at the University of Hawaii to provide "expanded opportunities for Hawaii's students to acquire education and training in law."[1] As is true for most law schools, "[e]ach year many more qualified persons apply . . . than can be admitted," and, in 1984-86, from 300 to 350 of the 400 to 450 applicants each year were rejected as the 80 seats in each class were filled.[2] Appellant Robert W. Hall, a white male Hawaii resident whose undergraduate grade point average (GPA) and Law School Admission Test (LSAT) scores made it mathematically impossible for him to gain admission,[3] was denied admis-

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[1] Haw. Sen. Stand. Comm. Rep. No. 797-71, 1971 Haw. Sen. J. 1144, 1145 (legislative history of Law School enabling Act).

[2] Affidavit of Jeremy T. Harrison dated June 27, 1986, at ¶ 4 ("Harrison Aff.") (1 Record on Appeal 242), Motion App. C-33, *see also* Aff. of Williamson Chang dated Dec. 13, 1984, at ¶ 21, No. 84-1072 (D. Haw. Dec. 14, 1984) ("Chang Aff.") (1 R.A. 281), Motion App. C-31. Under two protective orders issued on July 18, 1986, and October 1, 1986, of which appellant had notice at all relevant times, if appellant chose to defend against appellees' motion for summary judgment by relying on these filed affidavits, the lower courts were to "consider the affidavit[s] in [their] entirety in ruling upon the motion." 2 R.A. 182, 185; 6 R. 333-34. These "rule of completeness" provisions were brought into play because appellant, by pointing to statements in the appellees' affidavits taken out of context, sought to prove to the state courts that material fact questions existed. *See, e.g.* Affidavit of Robert W. Hall dated July 3, 1986, at ¶¶ 11, 16-20, 23-26, *relied on,* Mem. in Opp. ¶ 23 (Haw. Cir. Sept. 16, 1986), 6 R.A. 260; Amended Complaint ¶ 38, No. 86-1646 (Haw. Cir. May 2, 1986), Motion App. B-21, *reincorporated and relied on,* Mem. in Opp. ¶ 19 (Haw. Cir. Sept. 15, 1986), 6 R.A. 260 (Chang Aff.). *See generally* Order (Haw. Cir. Jan. 14, 1987), Motion App. A-3.

[3] Harrison Aff. ¶ 7, Motion App. C-36; Chang Aff. ¶ 21, Motion App. C-31.

sion to the regular class in these three admission years.[4] Given his background of business success and lack of social disadvantages, appellant was also rejected from the Law School's "Pre-Admission Program," which is modeled upon programs approved by *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and its progeny.[5] Appellant in all three years also failed to disclose or explain material facts relating to a 1980 incident at the Waikiki Yacht Cub, in which, in the words of the Supreme Court of Hawaii, appellant "fired a gun wildly into a crowd of people, hitting three people below the waist and narrowly missing a fourth,"[6] and which led to appellant's indictment on four counts of attempted murder and related weapons charges upon which appellant was acquitted on a theory of "pathological intoxication" from white wine.[7] In at least his 1984 Application, Appellant also overstated his undergraduate GPA by stating the average

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[4] *See id.*

[5] *See* Harrison Aff. ¶¶ 5, 7, Motion App. C-36, 37; Chang Aff. ¶¶ 14-16, Motion App. C-29, 30.

[6] *State v. Hall*, 66 Haw. 300, 301, 660 P.2d 33, 34 (1983). The Law School became aware of the criminal action against appellant after the filing of the 1984 application but before the 1984 civil action in *Hall I*. *See* Chang Aff. ¶ 12, Motion App. C-29. Under clearly stated Law School application forms, appellant was informed in each of the three years in which he applied that signing the application warranted that "the information you have given to the Law School is complete and truthful, and that no information reasonably relevant to your admission to the School has been purposely withheld." *Id.; see also* Harrison Aff. ¶¶ 9, 14, 17-23, Motion App. C-36-39, 40-43 (admission criteria in 1985 and 1986 and appellant's refusal in all three admission years to admit or explain the 1980 shooting incident).

[7] *Id.* at 303, 660 P.2d at 35. Appellant's own criminal defense attorneys admitted, in pleadings in the criminal action, in evi-

(Continued on following page)

only of grades received at Chaminade University, where he was scheduled to be graduated in 1984, while failing to refer to substantially lower grades he had received from State Teachers College at the University of Maryland at Towson, in 1951-54, and at evening college at Armstrong College, Savannah, Georgia, in 1955-59. Harrison Aff. ¶¶ 11, 12, Motion App. C-37, 38; *see also* Chang Aff. ¶ 13 (Motion App. C-29). Appellant also did not explain this overstatement in subsequent application years, although its materiality was made clear to him prior to the filing of his application in 1985. Harrison Aff. ¶¶ 14-16, Motion App. C-29. After his rejections, the Appellant filed two lawsuits to overturn the Law School's adverse decisions.

(Continued from previous page)

dence below, that appellant's temporary lack of capacity was demonstrated by "scientific, unbiased tests thoroughly conducted and analyzed," manifesting "the skepticism appropriate under the circumstances." Memorandum in Support of Motion for Judgment of Acquittal Based on Physical Disorder, Cr. No. 54332 (Haw. Cir. Jan. 4, 1982), Ex. 1 to Def. Reply Mem. 7 R.A. 41.

In an action to seal the records in the criminal case, the Supreme Court of Hawaii rejected on the merits appellant's claim that the acquittal in Cr. 54332 was not based on "pathological intoxication" and held there was "no constitutional or statutory basis for sealing the record." *State* v. *Hall*, No. 12636 (Haw. Aug. 18, 1988), Motion App. D. The preclusive effect of the state Circuit Court's denial in November, 1987, of the motion to seal was timely raised in the state Court of Appeals in this case, see Appellees' Motion for Retention of Oral Argument, No. 11992 (Haw. App. May 23, 1988) (and accompanying documents), but was not reached by the state Court of Appeals in the case now before this Court. Should this Court need to reach the effect under 28 U.S.C. § 1738 of appeal No. 12636, the state court order, appellant's brief, and the affidavit of Deputy Prosecutor Thomas Pico, see Motion App. D, E, F, *infra*, are printed here. The affidavit of Mr. Pico was presented below in this case in the state Court of Appeals and the appellant's brief in No. 12636, although not so presented, assists in explaining the August 1988 order. *See Maryland* v. *United States*, 381 U.S. 41, 53 n.38 (1965).

2. In the first case, filed in United States District Court in autumn 1984, and dismissed on summary judgment in January 1985, the United States Court of Appeals for the Ninth Circuit on June 10, 1986 upheld the entry of summary judgment against Mr. Hall on a host of federally based claims[8] against appellees or their privies. The effect of these claims, if granted, would have been to force the Law School to jump appellant over dozens of applicants with higher qualifications who were denied admission, or to restrain enforcement of Hawaii laws that bar those who do not graduate from law school from sitting for the Hawaii bar examination. *Hall v. State of Hawaii*, 791 F.2d 759 (9th Cir. 1986) ("*Hall I*"), J.S. App. 26, 30 (concurring with the district court's conclusion "that Hall's federal claims entirely lacked a foundation"); *see also id.* at 22-25 (district court order); Motion App. C (complaint from Civil No. 84-1072 (D. Haw.)).

a. The Court of Appeals also rejected claims arising under Hawaii law brought against appellees or their privies in their individual capacities. These claims were not barred by sovereign immunity and *Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89 (1984) ("*Pennhurst II*"), nor did the Ninth Circuit exercise its discretion to dismiss claims without prejudice under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). *See Hall I*, 791 F.2d at 761, J.S. App. 31.

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[8] These claims purported to arise under 42 U.S.C. §§ 1981, 1982, 1983, 1985, 2000d, and 2000e (civil rights and employment discrimination); 18 U.S.C. § 245 (criminal law); 20 U.S.C. § 1681 (sex discrimination); 15 U.S.C. § 1 (antitrust); and the Equal Protection and Due Process Clauses of the Constitution.

3. Appellant did not seek review in this Court of his loss in the inferior federal courts. Instead, he filed a new action in the courts of Hawaii. *See* Complaint, *Hall v. State*, No. 86-1646 (Haw. Cir. filed May 2, 1986) ("*Hall II*"), Motion App. B. Appellees pleaded merger and bar and collateral estoppel, as well as numerous other defenses based on governing standards and a record of undisputed material facts.[9] The state trial Court granted summary judgment based on "arguments advanced at the hearing, the memoranda and evidence filed herein, and the records and previous orders herein and in *Hall* [*I*]," and the Intermediate Court of Appeals affirmed. *Hall v. State of Hawaii*, 756 P.2d 1048 (Haw. App. 1988) ("*Hall II*").

a. The state Court of Appeals reasoned that, because of jurisdiction exercised by the federal courts in *Hall I*, "all of Hall II's federally based claims are barred," J.S. App. 14. The court held, further, that "[e]ven if Hall has a cause of action for violation of any right he might have under the state constitution or the statutes he has cited, he would be collaterally estopped from proving that the result of the constitutional or statutory violation was to

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[9] The sole evidence of purported unlawful discrimination submitted in *Hall I* was an appendix to a 1983 university report addressing admissions at the Law School, which contained criticism that the facially non-discriminatory criteria for admission to the Pre-Admission program "as a practical matter translate into motivated applicants who are other than Caucasian, Chinese, Japanese and Korean." Ex. E-14 to Complaint, *Hall I*, 4 R.A. 47. Appellees had urged the Ninth Circuit to reject this evidence as insufficient under *Washington v. Davis*, 426 U.S. 229 (1976), and the Court of Appeals did not even mention it in rejecting the claims in *Hall I*. *See* 791 F.2d at 761. This evidence was also the sole basis for appellant's claim of discrimination in *Hall II*, and we likewise urged its rejection in that action.

unlawfully discriminate against him." *Id.* 16. Although judgment in the Ninth Circuit in *Hall I* was entered after appellant's rejection in all three years (June 10, 1986), the Hawaii appellate court reasoned that, even if the date of judgment in the federal district court (January 23, 1985) was the operative date for federal preclusion purposes, appellant was barred because "Hall II presents no discernible change in the 'material operative facts' from those complained of in Hall I." J.S. App. 17 (quoting *Restatement (Second) of Judgments* § 24, comment (f) (1982)). The court held all defendants in *Hall II* other than a Deputy Attorney General who defended *Hall I*, and who was charged in *Hall II* with libel, were in privity with those in *Hall I*, and that the libel claim was barred by the absolute privilege for statements "in preparation for Hall I's defense." J.S. App. 18-19 (citing *McCarthy v. Yempuku*, 5 Haw. App. 45, 678 P.2d 11 (1984)). At no time in the state trial court did appellant preserve any federal constitutional objection to the entry of judgment on the basis of the preclusive effect of *Hall I*, [10] and neither the

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[10] Appellant's objection to the entry of judgment on the basis of *Hall I* was stated in his Memorandum in Opposition to Motion to Dismiss, Or in the Alternative, For Summary Judgment, No. 86-1646 (Haw. Cir. filed Sept. 15, 1986), in the following words:

> The defendants' argument that the federal court complaint and the state court complaint are the same is first moot, since the federal court refused to take jurisdiciton [sic] over the entire Amended Complaint in Civil No. 84-1072. Second the representation is belied by a paragraph by paragraph reading of both amended complaints, the best evidence from which to make that comparison. The federal court Amended Complaint in Civil No. 84-1072 is

(Continued on following page)

state Court of Appeals nor the Supreme Court of Hawaii passed on such a claim in their recent opinions and orders.

ARGUMENT

This appeal should be summarily dismissed. Although the appeal escapes the forthcoming elimination of mandatory review it fails to draw in question a state statute within the meaning of 28 U.S.C. § 1257(2), and, accordingly, the Court's mandatory jurisdiction fails. Even were a state statute drawn in issue, or the authority under 28 U.S.C. § 2103 employed to treat the papers whereon appeal

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> attached hereto as Exhibit "VV". The plaintiff requests that the court take judicial notice of the Amended Complaint in Civil No. 84-1072 and make a paragraph by paragraph comparison unless the court is willing to reject the defendants' "same cause of action" argument out of hand. The instant Amended Complaint is an entirely re-written complaint covering three years of admissions applications, new evidence, and new state claims; the federal complaint covered just one admissions year. One paragraph does not make a complaint.

Id. at 13 ¶ 18, 6 R.A. 281; *see also id.* at 4, ¶¶ 1, 2, 6 R.A. 267, 268. Appellant stated constitutional opposition to entry of judgment on factual claims in Professor Chang's and Dean Harrison's affidavits, but did not clearly object on federal constitutional grounds to a preclusion bar. He stated:

> The Circuit Court does not have the statutory or the constitutional right to deprive the plaintiff of a trial by jury on the Amended Complaint by the substitution of a summary judgment hearing where the court has already denied discovery. The plaintiff claims all of his due process and constitutional rights unfettered by the Hawaii Rules of Civil Procedure.

Id. at 11, ¶ 16, 6 R.A. 274.

is taken as a petition for certiorari, appellant fails to demonstrate, at least with respect to his constitutional claims, how the foundation for presentation of those claims was laid in the courts below. Although as a general matter a state court's rulings upon the preclusive effect of a federal judicial decree present questions that may be reviewed in this Court under 28 U.S.C. § 1257(3), none of appellant's federal claims in *this* case should be deemed reviewable let alone substantial. Appellant's principal claim—that the state courts overenforced the judgment in *Hall I* by precluding the presentation of parallel state law causes of action—ultimately seeks this Court's effort to extend the scope of state law in contravention of the well-established independent and adequate state ground doctrine and the rule of *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), that official-capacity claims against state officials arising under state law are not cognizable in the Courts of the United States.

Even if the Court were to reach the merits of appellant's attack on the state Court of Appeals' application of settled preclusion principles, further review would be inappropriate. Given the record, the state courts did not misapply the privity or "change in circumstances" doctrines, and, for this reason, appellant's attempts to revive his federal causes of action are meritless. Appellant's attack on the Court of Appeals' decision to bar the state law claims set forth in *Hall II*, as well as embodying these faults, misinterprets the "jurisdictional incompetence" afforded by the Eleventh Amendment, and, therefore, ignores the impact of the state-law individual capacity claims adjudicated in *Hall I* as well as the issue preclusive

consequences, under a variety of state law doctrines with which Hawaii courts are uniquely familiar, of the judgment in *Hall I* on appellant's state claims. Indeed, in light of the record showing appellant, given his relative qualifications for admission to the study of law, would not be benefitted even if a preclusion bar were lifted, this is not a case where Article III standing is supported, and, thus, review should be denied.

I. Appellant Has Not Drawn in Question A State Statute and Therefore the Mandatory Appellate Jurisdiction Fails.

Under 28 U.S.C. § 1257(2), no appeal lies where there is not "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States." Nowhere in the jurisdictional statement does appellant identify which, if any, *state* statute is drawn in question, and, more important, how on federal grounds any such statute has been drawn in question. Appellant argues the judgment constitutes "affirmance of the admissions rules and regulations of the University of Hawaii which have the effect of law," Juris. Stmnt. 18, but "not every government action which has the effect of law is legislative action." *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 43 (1983). Whether or not for purposes of *federal* law, namely, 28 U.S.C. § 1257(2), the admission policies of the School of Law constitute a "stat-

ute of any state,"[11] what is challenged in this appeal is not the federal validity of the School of Law's admission policies, but that of the Hawaii Intermediate Court of Appeals' decision, in applying the doctrine of federal preclusion, not to even reach appellant's attack upon those policies. In this case, even assuming, *arguendo*, that University of Hawaii admission policies, for purposes of § 1257(2), are state statutes, here the state Court of Appeals' express refusal to reach the federal validity of those statutes by reason of the compulsion of the federal common law of preclusion precludes review by way of 28 U.S.C. § 1257(2). *See Garrity v. New Jersey*, 385 U.S. 493, 495-96 (1967); *cf. Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 247 (1984) (no appeal when issue is decided "without reference to the [purported] state statute"). Indeed, appellant's basis for mandatory jurisdiction is at the least doubly flawed, for there is no indication in the record that appellant preserved his appeal to this Court by making the "explicit and timely insistence," throughout the state trial court proceedings and on appeal to the state Court of Appeals, that "a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182 (1945). Appellant notes only that the issue necessary to preserve § 1257(2) review here was raised in the Supreme Court of Hawaii on the application for certiorari. Juris. Stmnt. at 7. Appellant's cited grounds

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[11] Appellees concede that the issue under § 1257(2) is not governed by whether such policies must be promulgated as formal rules under the state Administrative Procedure Act, *see infra* p. 26, *cf. Department of Banking v. Pink*, 317 U.S. 264, 268 (1942) (whether state judgment is final is controlled by federal law).

of error in the Intermediate Court of Appeals, *id.* at 8, however, are bereft of any basis for preserving a mandatory appeal here, and, indeed, the questions presented here do not advert to any claim that would require notation of probable jurisdiction, even if the claims are otherwise within the Court's jurisdiction or are substantial. Given the "policy that statutes authorizing appeals are to be strictly construed," *Silkwood v. Kerr-McGee Corp.*, 464 U.S. at 247, the present appeal should be dismissed.

II. Appellant's Federal Constitutional Claim Was Not Properly Presented in the Courts Below.

This Court has made clear that, regardless of the source by which review of state court judgments is obtained in this Court, "[e]ven if [this Court] were not jurisdictionally barred from considering claims not pressed or passed upon in the state court, as has sometimes been stated, . . . the long-standing rule that this Court will not consider such claims creates, at the least, a weighty presumption against review." *Heath v. Alabama,* 474 U.S. 82, 87 (1985); *see Illinois v. Gates,* 462 U.S. 213, 218-22 (1983); S. Ct. R. 15.1(g); 21.1(h). Moreover, it is insufficient to raise the question properly for the first time in a state appellate court, if it is the practice of the state appeals courts not to consider issues not properly preserved in the inferior state courts. *See Bailey v. Anderson,* 326 U.S. 203, 207 (1945); *cf. District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 484 n.18 (1983). Hawaii appellate courts follow the general rule that they will not, except for important reasons, consider federal questions presented for the first time on appeal. *See, e.g., City Bank v. Saje Ventures II,* 748 P.2d 812, 816

(Haw. App. 1988) (citing, *e.g.*, *Mizoguchi v. State Farm Mutual Auto. Ins. Co.*, 66 Haw. 373, 383, 663 P.2d 1071, 1077 (1983)). *See also Ala Moana Boat Owners v. State*, 50 Haw. 156, 158, 434 P.2d 516, 518 (1967) (on requirements for briefing issues in the state appellate courts).

Appellant's constitutional claim that his "federal due process rights and access to the court's rights" are abridged by the state courts' application of federal preclusion doctrine, Juris. Stmnt. i, were not properly presented in the state trial courts, a point appellees pressed in the state Court of Appeals. *See* Appellees' Answering Brief at 25 n.9, No. 11992 (Haw. filed July 15, 1987) (citing *Airgo, Inc. v. Horizon Cargo Transp., Inc.*, 66 Haw. 590, 596, 670 P.2d 1277, 1281-82 (1983)). Indeed, appellant virtually admits this to be so by seeking an exemption from the pressed or passed upon rule under *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). Juris. Stmnt. at 6. *Saunders*, however, is inapt, because appellees throughout asserted the effect of *Hall I*, as the state trial court briefs, *see supra* n.10, the state trial court order, Motion App. A, and the state appeals court decision, J.S. App. 11-12, show. Here the judicial act complained of was not "done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record." *Saunders*, 244 U.S. at 340. Appellant was on notice from the beginning that appellees sought to end the case on the basis of *Hall I*, and could have timely opposed entry of judgment in the trial court on the ground that doing so would violate purported rights to procedural due process or a federal right of access to the courts. He did not do so. *See Bankers Life and Casualty Co. v. Crenshaw*, 108

S. Ct. 1645, 1650 (1988) (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)). The state courts on appeal for this very reason did not pass on any federal constitutional claim arising out of their construction of preclusion doctrine. Though such claims are meritless, neither should this Court.

III. Appellant's Claims in this Court are Barred by the Independent and Adequate State Ground Doctrine and the Eleventh Amendment.

It has been the law for more than a century that under 28 U.S.C. § 1257 this Court has no jurisdiction to review a state court decision that rests upon an independent and adequate state ground. *Murdock v. City of Memphis*, 89 U.S. (20 Wall.) 590, 636 (1875). Although the rule is frequently invoked in the favor of a prevailing plaintiff to prevent review by a nonprevailing defendant, *see Michigan v. Long*, 463 U.S. 1032 (1983), the principles underlying the rule, "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions," *id.* at 1040, apply equally when included within the federal question under review—here the breadth to be given the federal judgment in *Hall I* in precluding state law causes of action—are issues governed by state law, on which the decisions of the state courts are dispositive. *See, e.g., Posadas de Puerto Rico Association v. Tourism Co.*, 478 U.S. 328, 339 n.6 (1986); *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959); *cf. Frisby v. Schultz*, 108 S. Ct. 2495, 1501 (1988) (reversing lower federal court view of state law).

Appellant urges that it was federally improper for the lower state courts to extend the preclusive consequences

of *Hall I*'s rulings upon appellant's federal causes of action to those claims arising under parallel provisions of the Hawaii constitution and statutes. The essence of the state court's ruling, however, is that "[e]ven if Hall has a cause of action under the state constitution or the statutes he has cited, he would be collaterally estopped from proving that the result of the constitutional or statutory violation was to unlawfully discriminate against him." *See* J.S. App. 16. Necessarily included within this determination is a finding, as a matter of Hawaii law, that the cited state laws out of which appellant's purported state law rights arose provide, in the instant circumstances, no greater protection than their federal counterparts. This finding, of course, is consistent with Hawaii precedent. *E.g., Nakano v. Matayoshi*, 68 Haw. 142, 152-53, 706 P.2d 814, 821 (1985) (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938)); *State v. Tookes*, 67 Haw. 608, 615, 699 P.2d 983, 988 (1985) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)); *State v. Mueller*, 66 Haw. 616, 671 P.2d 1351 (1983) (citing *Stanley v. Georgia*, 394 U.S. 557 (1969)); *Island Tobacco Co. v. R.J. Reynolds Tobacco Co.*, 63 Haw. 289, 297, 627 P.2d 260, 266-67 (1981) (federal antitrust standards). The state court's decision not to extend the rights conferred by state law in such a manner as would render *Hall I* of no issue preclusive effect is thus a matter over which this Court has no jurisdiction. *Demorest v. City Bank*, 321 U.S. 36, 42 (1944); *see generally Logan v. Zimmerman Brush Co.*, 454 U.S. 422, 432 (1982) (citing *Martinez v. California*, 444 U.S. 277 (1980)).

This is particularly so in light of the very principles behind the Eleventh Amendment which appellant wrongly

believes have been unfairly applied. Neither the Eleventh Amendment, nor the doctrine of sovereign immunity, to be sure, protect state officials in their individual capacities from claims for damages based on state law. *See Papasan v. Allain*, 478 U.S. 265, 278 n.11 (1986). However, "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Pennhurst II*, 465 U.S. at 106. Under the Eleventh Amendment, every federal court is obligated to " 'examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment.' " *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 251 (1985). Here, except insofar as he asserts that the rule applied by the lower courts is wrong on its face—that a claim arising under state law may never be barred by litigation upon parallel federal claims—appellant seeks a federal writ directed to state judges in breach of now-settled precepts of Eleventh Amendment jurisprudence that bar enforcement of state-created rights through exercises of the judicial power of the United States. Under the law correctly viewed, however, if this Court finds that the preclusion theories adopted by the lower courts are not facially erroneous, this Court's inquiry is at an end. Indeed, any claim against the State, the University, the Law School, or for damages from appellees in their official capacities, or for equitable enforcement of state law, cannot be aided by this Court in light of the Amendment. *See Papasan*, 478 U.S. 265, 277-78.

IV. Appellant's Challenge to the Lower Courts' Analysis of Federal Preclusion Doctrine is Insubstantial.

Even if the Court may properly reach appellant's attack on the state Court of Appeals decision, that attack is wholly unworthy of this Court's attention. As to appellant's federal claims, appellant's claimed grounds of error are totally without merit. Appellant would make a nullity of *Ex Parte Young*, 209 U.S. 123 (1908), in any case in which state law claims could be pleaded upon the same subject matter. Under appellant's theory, even if he had won in *Hall I*, appellees could wipe out that federal order by bringing a declaratory judgment proceeding in state court to exonerate themselves under state law. *See* Juris. Stmnt. at 10 (asserting that *Hall I* is a "moot judgment"). Although "*Young*'s applicability has been tailored to conform as precisely as possible to those specific situations in which it is 'necessary to permit the federal courts to vindicate federal rights,'" *Papasan*, 478 U.S. at 277, it remains a central feature of our constitutional jurisprudence. Moreover, it is black letter law that the Eleventh Amendment did not protect the *Hall I* defendants in their individual capacities, *see* 478 U.S. at 278 n.11, and those defendants, and their privies, are entitled to the full benefit of their federal victory. Given this fact, there is no issue that appellant's federal claims as to all defendants in *Hall II* for admission years 1984 through 1986, when the case was still pending in the federal courts, were barred. Even if one takes January 1985 —the date of entry of judgment in the federal district court —as the relevant date, *but see Lawlor v. National Screen Service*, 349 U.S. 322 (1955), appellant points to no change

in the "material operative facts" relating to his federal claims in admission years 1985-86. J.S. App. 18; *see also Restatement (Second) of Judgments* § 27 comment c (1982); *Nevada v. United States*, 463 U.S. 110, 130-31 (1983) (following second *Restatement*). Indeed, if anything, because appellant's objective qualifications (undergraduate grades and LSAT scores) did not improve, and, by reason of appellant's continued dissembling over the 1980 Waikiki Yacht Club incident and prior grades, appellant's relative qualifications diminished. The decision to bar plaintiff's claims as to admission years 1985 and 1986 is fully consistent with decisions in the courts of appeals, *see Harnett v. Billman*, 800 F.2d 1308, 1315 (4th Cir. 1986); *Martin-Trigona v. United States*, 779 F.2d 72, 73 (D.C. Cir. 1985), and appellant points to no true conflict with a decision of a court of appeals or of a sister state court. Appellant's claim that "those who were never parties to the original litigation appear to be at risk" (Juris. Stmnt. 16) is plainly inapt. Appellant clearly was a "party to the original litigation," and no claim could be made that the privity analysis set forth in *Nevada v. United States*, 463 U.S. at 136-43, was violated below. *See id.* at 136-37 (no dispute that original parties and "their successors can rely on the decree"). Moreover, it has been the law since at least *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), that mutuality of parties is not necessary to obtain issue preclusion against a private litigant by reason of a federal judgment. *Cf. United States v. Mendoza*, 464 U.S. 154, 163 (1984) (mutuality when preclusion is sought *against* the sovereign).

Appellant's real complaint, apparently, is over the extension of *Hall I's* bar to his state law claims. Juris.

Stmnt. 13. But appellant ignores at least two points that are each sufficient to destroy any claim that, under the circumstances here, it was inappropriate to bar the state law claims. First, the Eleventh Amendment protects *States*. It does not protect state officials in their individual capacities, and pendent claims arising under state law may still be heard in the federal courts against state officials in such capacities, *Pennhurst II* notwithstanding. Indeed, under Hawaii law, when a state employee is exonerated, "it follows that the employer would also be immune." *Hulsman v. Hemmeter Corp.*, 65 Haw. 58, 61-62, 647 P.2d 713, 717 (1982); *cf. City of Los Angeles v. Heller*, 475 U.S. 797, 799 (1986) (per curiam). Dismissal of appellant's individual capacity state claims in *Hall I* barred any judgment against appellees here. Second, the essence of issue—as opposed to claim—preclusion is that it bars relitigation of facts previously decided "and necessary to the outcome of the first action" even "upon a different cause of action." *Parklane Hosiery Co.*, 439 U.S. at 326 n.5. Claims that a jurisdictional competency requirement applies to limit the merger and bar effect of a federal adjudication that, because of the lack of State consent, could not reach state claims against a State, *cf. Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 383 n.3 (1985), do not by their own terms apply to collateral estoppel. Where, as here, appellant's state claims were defeated on collateral estoppel grounds, decisions such as *Nilsen v. City of Moss Point*, 701 F.2d 556, 562 (5th Cir. 1983), are totally inapplicable.

Any claim, even if properly presented, that application of the doctrines of merger and bar and collateral estoppel on this record are unconstitutional cannot be

taken seriously. The right to present one's claims may well enjoy certain constitutional protections, but those protections, in this context, extend only to the right to "a 'full and fair opportunity' to litigate the claim *or* issue." *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 480-81 (1982) (emphasis added). No claim can be made—particularly when appellant did not appeal from *Hall I*—that appellant did not receive the "process due" in federal court. On this record, no substantial federal issue is present, and added review of the claims ought to be denied.[12]

V. In light of the Substantial Alternative Grounds for Entry of the Judgment, Review Should Be Denied.

"The familiar rule of appellate court procedure in federal courts [is] that, without a cross-petition or appeal, a respondent or appellee may support the judgment in his favor upon grounds different from those upon which the court below rested its decision," *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940), and that this Court need not be bound by a state court's determination that a complaint states a federal claim. *See Straub v. City of Baxley*, 355 U.S. 313, 318 (1958). Moreover, in cases arising from the state courts, litigants must show more than " 'unadorned speculation' " that reversal on a federal defense would give rise to relief as a matter of state law. *Pennell v. City of San Jose*, 108 S. Ct. 849, 855 (1988) (quoting *Simon v. Eastern Kentucky Welfare*

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[12] If the State courts rejected Hall's claims on state law grounds, see J.S. App. 18-19, no federal issue is raised. *See Merrell Dow Pharmaceuticals Co. v. Thompson*, 478 U.S. 804, 818 (1986) (dissenting op.); *Osborn v. Bank of the United States*, 9 Wheat. 738, 824 (1824).

Rights Org., 426 U.S. 26, 46 (1976)). The laws governing this Court's authority make clear that the Court "shall give judgment . . . without regard to errors or defects which do not affect the substantial rights of the parties." *See* 28 U.S.C. § 2111 (1982).

Although the court below chose to decide this case on the basis of federal preclusion principles, appellant's complaint and the record below could not possibly give rise to any valid claim. As a matter of federal law, once the amended complaint is stripped of "legal conclusion[s] couched as . . . factual allegation[s]," *Papasan*, 478 U.S. at 286, appellant's concerns over the School of Law's system of weighting the GPA or LSAT score are wholly frivolous in light of *Regents v. Ewing*, 474 U.S. 214 (1986) Appellant's other claims seek relief from the very sort of "[c]ompetitive consideration of race and ethnic origin," *University of California Regents v. Bakke*, 438 U.S. 265, 320 (1978) (op. of Powell, J.); *id.* at 324, 328 (op. of Brennan, White, Marshall, and Blackmun, JJ.), that the Court has upheld. *See also Wygant v. Jackson*, 476 U.S. 267, 283 n.11 (1986) (op. of Powell, J.); *Johnson v. Santa Clara County*, 107 S.Ct. 1442, 1452 (1987). Appellant has no claim for employment discrimination, *see Hishon v. King & Spaulding*, 467 U.S. 69, 74 & n.5 (1984); Haw. Rev. Stat. ch. 378 (1985), nor for breach of the antitrust laws, *see Hoover v. Ronwin*, 467 U.S. 588 (1984); *Big Island Small Ranchers Assoc. v. State*, 60 Haw. 228, 588 P.2d 430 (1978) (same). Nor has appellant shown any property right (or derivative federal or state right to a hearing), *see Olin v. Wakinekona*, 461 U.S. 238, 250 (1983); *Sharma v. State*, 66 Haw. 632, 673 P.2d 1030 (1983), *cert. denied*, 469 U.S. 836 (1984). Even in the state courts, all of appellant's claims

for damages would be barred by sovereign immunity, *see Figueroa v. State,* 61 Haw. 369, 604 P.2d 1198 (1979) (state constitutional claims); *Makanui v. DOE,* 721 P.2d 165 (Haw. App. 1986) (federal constitutional claims); *see also Julius Rothschild & Co. v. State,* 66 Haw. 76, 655 P.2d 877 (1982) (per curiam) (tort claims); *Meyer v. Territory,* 36, 75, 77 (1942) (contract claims); *Jacober v. Sunn,* 715 P.2d 813, 821 (Haw. App. 1986) (statutory claims); Haw. Rev. Stat. § 662-15(4) (1985) (intentional tort claims), or by officer's immunity, *see Anderson v. Creighton,* 107 S.Ct. 3034 (1987); *Bullen v. DeRego,* 724 P.2d 106 (Haw. 1987) (following federal immunity analysis for state law claims). It is also quite clear, whether the University is an "agency" for purposes of the state Administrative Precedure Act, *see Waugh v. University of Hawaii,* 63 Haw. 117, 621 P.2d 957 (1980), that it is exempted by the "internal management" exclusion from having to promulate its admission policies by means of public rule-making procedures. *See* Haw. Rev. Stat. § 91-1(4); *Aguiar v. Hawaii Housing Auth.,* 55 Haw. 478, 488 n.17, 522 P.2d 1255, 1262 n.17 (1974); *see also Rose v. Oba,* 717 P.2d 1029 (Haw. 1986); *Gibb v. Spiker,* 718 P.2d 1076 (Haw. 1986). On summary judgment, it was undisputed that appellant was mathematically incapable of being admitted to the regular class in the years in which he applied to the Law School, and that appellant's record raised independent compelling reasons to deny an offer of admission. In response appellant rested " 'on the hope that a jury may disbelieve factually uncontested proof,' " *Costa v. Able Distributors, Inc.,* 3 Haw. App. 486, 489, 653 P.2d 101, 104 (1982), and, under the discretion conferred by Rule 56(f), Haw. R. Civ. P., which is

identical to its federal counterpart, failed to show "'"how postponement of a ruling on the motion [would] enable him, by discovery or other means, to rebut the movants' showing." *Wilder v. Tanouye*, No. 12167 (Haw. App. Mar. 17, 1988). Appellant was simply not a victim of unlawful state action. Further review could not possibly give rise to a victory for appellant, either in this Court or in the courts below.[13] Accordingly, review should be denied.

—o—

CONCLUSION

For the reasons above, the appeal should be dismissed for want of jurisdiction, or for want of a properly presented or substantial federal question, or the judgment affirmed. If the Court chooses to treat the papers whereon appeal is taken as a petition for certiorari, the Court should deny the petition.

Respectfully submitted,

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Attorney General
State of Hawaii
**Counsel of Record*

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Counsel for Appellees

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[13] Although the order in appeal No. 12636, Motion App. D, is not fully dispositive of this case, it clearly limits, until reversed, appellant's claims. *See* 28 U.S.C. 1738.

APPENDIX

APPENDIX A

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Attorney General
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Attorneys for Defendants

1st CIRCUIT COURT

STATE OF HAWAII
FILED
1987 JANUARY 14 P 1:38

B. NAKAMAEJO
CLERK

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

Civil No. 86-1646

ROBERT W. HALL, an individual,

Plaintiff,

vs.

STATE OF HAWAII, a State of
the United States, et al.,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION TO STRIKE AND FOR SANCTIONS, DENYING PLAINTIFF'S SECOND MOTION TO STRIKE, OBJECTION, AND FOR SANCTIONS, AND DENYING ALL OTHER MOTIONS FILED BY PLAINTIFF

Date: November 18, 1986

Time: 10:30 a.m.

Judge: Hon. Robert G. Klein

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, DENYING PLAINTIFF'S MOTION TO STRIKE AND FOR SANCTIONS, DENYING PLAINTIFF'S SECOND MOTION TO STRIKE, OBJECTION, AND FOR SANCTIONS AND DENYING ALL OTHER MOTIONS FILED BY PLAINTIFF

The Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, filed on June 27, 1986, and the Plaintiff's Motion to Strike and for Sanctions, filed October 29, 1986, and Second Motion to Strike, Objection and for Sanctions, filed on November 5, 1986, as well as various other motions brought by Plaintiff, came on for hearing on November 18, 1986 at 10:30 a.m. before the Honorable Robert G. Klein. Present at the hearing were Steven S. Michaels and Robert A. Marks, Deputy Attorneys General, appearing for the Defendants, and Robert W. Hall, appearing for himself.

The Court, having considered the arguments advanced at the hearing, the memoranda and evidence filed herein,

and the records and previous orders herein and in *Hall v. State of Hawaii,* No. 84-1072, (D. Hawaii, judgment entered January 23, 1985), *aff'd,* 791 F.2d 759 (9th Cir. 1986) ("*Hall I*"), hereby finds and concludes as follows:

1. Exercising the discretion afforded the Court by Rule 56(f), Hawaii R. Civ. P., the Court has reviewed the affidavits submitted in connection with the motions disposed of here, and finds that plaintiff has not sufficiently set forth what admissible evidence giving rise to a genuine issue of material fact would be produced by additional discovery. *See Hall v. State of Hawaii,* 791 F.2d at 761.

2. At the hearing on the motions disposed of here, the Court gave the Plaintiff additional leave to provide a clear and concise affidavit setting forth a basis under Rule 56 (f), Hawaii R. Civ. P., for this Court to refuse the application for judgment. The Court refrained from deciding the instant motions until December 8, 1986, so that Plaintiff would have an added opportunity to assert his rights under Rule 56(f), Hawaii R. Civ. P. No additional affidavits were submitted by Plaintiff.

3. With respect to the Plaintiff's various motions to strike, the Court finds that the Defendants' attorneys acted in good faith and within the letter and the spirit of Exhibit A to Rule 2, Hawaii Sup. Ct. R. The Court also finds that the evidence advanced by the Defendants in connection with their Motion to Dismiss, or in the Alternative for Summary Judgment, and the other motions disposed of here, is relevant to those motions and properly subject to consideration in connection with those motions.

4. After a review of the record in this action, in *Hall I,* and the applicable law, the Court finds that the

Amended Complaint fails to state a claim upon which relief can be granted, and, in any event, within the meaning of Rule 56, Hawaii R. Civ. P., there are no material facts in dispute and Defendants are entitled to judgment as a matter of law.

5. The Court further finds that the Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment, is adequately supported whether the Plaintiff's various motions to strike are granted or denied.

Now, therefore, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. The Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment is granted, and any and all claims appearing in Plaintiff's Amended Complaint are dismissed with prejudice.

2. The Plaintiff's Motion to Strike and for Sanctions, and the Plaintiff's Second Motion to Strike, Objection and for Sanctions are denied.

3. All other motions filed by Plaintiff in this action, whether or not properly noticed for hearing, are denied.

DATED Honolulu, Hawaii, January 13, 1987

/s/ ROBERT G. KLEIN
ROBERT G. KLEIN
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:
DECLINED—RH
ROBERT W. HALL
Plaintiff *pro se*

APPENDIX B

ROBERT W. HALL
583 Kamoku Street, #2605
Honolulu, Hawaii 96826
(808) 942-1766
Pro Se

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

CIVIL NO. 86-1646

ROBERT W. HALL, an individual,

Plaintiff,

vs.

STATE OF HAWAII, a State of the United States; UNIVERSITY OF HAWAII, a Hawaii corporation and a land-grant college; THE WILLIAM S. RICHARDSON SCHOOL OF LAW, a division of the University of Hawaii; ALBERT J. SIMONE, as an individual and in his capacity as acting President or President of the University of Hawaii; STEPHEN G. BESS, as an individual and as a Regent of the University of Hawaii; GLADYS A. BRANDT, as an individual and as a regent or as the Chair of the Board of Regents of the University of Hawaii; GREGORY DELA CRUZ, as an individual and as a regent of the University of Hawaii; JULIA FROHLICH, as an individual and as as Chair or regent of the Board of Regents of the University of Hawaii; ROBERT M. FUJIMOTO, as an individual and as a regent of the University of Hawaii; JAMES G. GARY, as an individual and as a regent of the University of Hawaii; DANIEL M. ISHII, as an individual and as a regent of the University of Hawaii; KENNETH N. KATO, as an individual and as a regent of the University of Hawaii; STANLEY Y. MUKAI, as an individual and as a regent of the University of Hawaii; WALTER R. STEIGER, as an indi-

vidual and as a regent of the University of Hawaii; BURT K. TSUCHIYA, as an individual and as a regent of the University of Hawaii; ROBIN COMPANIANO, as an individual and as a regent of the University of Hawaii; MARVIN J. ANDERSON, as an individual and as Chancellor of the University of Hawaii; RICHARD S. MILLER, as an individual and as Dean of the School of Law; JUDITH M. KIRKENDALL, as an individual and as Registrar and Director of Student Affairs of the School of Law; WILLIAMSON B.C. CHANG, as an individual and as a member of the Admissions Committee of the School of Law; IRENE RYPINSKI, as an individual and as a member of the Admissions Committee of the School of Law; LAWRENCE H. KAM, as an individual and as a member of the Admissions Committee of the School of Law; BODE UALE, as an individual and as a member of the Admissions Committee of the School of Law; WILLIE DOMINGO, as an individual and as a member of the Admissions Committee of the School of Law; DEAN KAUKA, as an individual and as member of the Admissions Committee of School of Law; JEREMY T. HARRISON, as an individual and as the acting Dean and as Dean of the School of Law; JAMES H. DANNENBERG, as an individual and as a deputy attorney general of the State of Hawaii; RONALD C. BROWN, as individual and as Chair of the Admissions Committee of the School of Law; JOHN E. PICKRON, as an individual and as a member of the Admissions Committee of the School of Law; JOHN DOES 1-20, JANE DOES 1-20, DOE PARTNERSHIPS 1-20, DOE CORPORATIONS 1-20, DOE GOVERNMENTAL ENTITIES 1-20, and DOE ENTITIES 1-20,

Defendants.

AMENDED COMPLAINT FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF OR IN THE ALTERNATIVE, AN APPLICATION FOR A WRIT OF MANDAMUS; SUMMONS

DEMAND FOR JURY TRIAL

1st CIRCUIT COURT

STATE OF HAWAII
FILED
1986 MAY—2 PM 1:03

H. SETO
CLERK

AMENDED COMPLAINT FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF OR IN THE ALTERNATIVE AN APPLICATION *FOR WRIT OF MANDAMUS*

The plaintiff ROBERT W. HALL, pro se comes now with this complaint and petitions this court for an injunction or in the alternative, for a writ of mandamus against the above-named defendants in their official capacity, and also in their individual capacities, and as reasons and grounds therefore, plaintiff alleges the following facts:

GENERAL—APPLICABLE TO ALL COUNTS

1. The plaintiff prays for all the relief to which he is entitled, whether specifically named in this complaint or not. This action arises under Article I, Section 8; the First, Fifth and Fourteenth Amendments to the Constitution of the United States; and the laws of the United States including but not limited to the Civil Rights Act of 1866, 1870, and 1871; Title IX of the Education Amend-

ments of 1972; Title I of the Civil Rights Act of 1968; Titles VI of the Civil Rights Act of 1964; all of the above as amended and as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

2. The jurisdiction of this court is also invoked as being a suit in equity authorized by law to be brought to redress the deprivation under color of unconstitutional state law, statute, regulation, custom and usage of a state of rights, privileges, and immunities secured by the laws and Constitution of the United States, viz., Sections 1983 and 1985 of Title 42 of the United States Code and the Fourteenth Amendment to the Constitution of the United States providing for the equal rights of citizens and of all other persons within the jurisdiction of the United States, as amended and as hereinafter more fully appears.

3. The jurisdiction of this court is also invoked under Article I, Section 4, Due Process and Equal Protection; Article I, Section 6, Rights of Citizens; Article II, Section 20, Construction, Article III, The Legislature, Section 1, Legislative Power; Article V, Section 5, The Judiciary, Administration; Article IX, Education, Section 1, Public Education; Section 4, University of Hawaii; Section 5, Board of Regents; Powers, providing for equal rights of citizens and all other persons within the jurisdiction of the State of Hawaii; the Hawaii Administrative Procedures Act, Chapters 91; the Public Agency Meetings and Records law, Chapter 92; the Hawaii Fair Employment Practice Law, Title 21, Chapter 378-1 et seq., Hawaii Revised Statutes; Chapters 304 (Universityof Hawaii), 661 (Actions By and Against the State), 662 (State Tort Liability Act), and 663 (Tort Actions), Hawaii Revised Statutes; state

and federal common law, and contract law; all of the above as amended and as hereinafter more fully appears.

4. The jurisdiction of this court is also invoked under the Hawaii Revised Statutes, Trade Regulation and Practice, Monopolies; Restraint of Trade, Section 480-4(a) and Section 480-9.

5. The jurisdiction of this court is also invoked under the Hawaii State Constitution and tort laws and is a complaint for slander and libel leading to defamation, and for the constitutional and statutory invasion of privacy. Jurisdiction is claimed but is not limited to Article 1, Section 6 of the Hawaii State Constitution, applicable tort law and 20 USC Subsection 1232(g), Family Educational and Privacy Rights.

6. The jurisdiction of this court is also invoked as a request for declaratory judgment under Chapter 632, HRS, for the purpose of determining a question in actual controversy between the parties, to wit, whether the practice of the defendants in denying plaintiff, on account of equal opportunity, his age and his race, his national origin, and his economic circumstance, the right to be admitted to and pursue courses of study at the state and federally supported University of Hawaii constitutes a denial of the right of the plaintiff to the equal protection of the laws under the Fourteenth Amendment to the United States Constitution and the laws of the United States and the laws and Constitution of the State of Hawaii.

7. All of the parties to this action, both plaintiff and defendants, are citizens of the United States and on information and belief, are citizens of the State of Hawaii. The plaintiff is a resident of the State of Hawaii. On informa-

tion and belief, the defendants are or were at the time the allegations of this complaint occurred, residents of and domiciled in, said state.

8. Defendant ALBERT J. SIMONE is the duly appointed, qualified, formerly acting, and now President of said university, and as such governs and controls the several colleges and schools of said university by the power vested in him by the Board of Regents; STEPHEN G. BESS, GLADYS A. BRANDT, GREGORY DELA CRUZ, JULIA FROHLICH, ROBERT M. FUJIMOTO, JAMES G. GARY, DANIEL M. ISHII, KENNETH N. KATO, STANLEY MUKAI, WALTER R. STEIGER, BURT K. TSUCHIYA and ROBIN COMPANIANO are or were all regents of the said university during a period of time covered by the allegations of this complaint, with power under the Hawaii Revised Statute section 26-11, to formulate policy, and to exercise control over the university through its executive officer, the president of the university; MARVIN J. ANDERSON is the former Chancellor of the Manoa campus of the University of Hawaii and possessed the power and the responsibility to appoint investigatory committees and to review the actions of the Admissions Committee of the School of Law; RICHARD S. MILLER is the former Dean of the School of Law who made a final review of the recommendations of the Admissions Committee during his term office; JEREMY T. HARRISON is the current Dean of the School of Law; JUDITH M. KIRKENDALL is the Registrar and Director of Student Affairs who makes the recommendations to the Admissions Committee with regard to initial qualifications or disqualification; WILLIAMSON B. C. CHANG, IRENE RYPINSKI, LAWRENCE H. KAM were the faculty members,

and BODE UALE, WILLIE DOMINGO, and DEAN KAUKA were the student members of a six member Admissions Committee of the School of Law for the 1984-85 school year admissions selection who possessed the authority to pass upon the eligibility of applicants who seek to enroll as students therein, including plaintiff; RONALD C. BROWN, LAURENCE KAM and JOHN PICKRON were the faculty members of the Admissions Committee for the School of Law for the 1985-86 school year admissions selection; Defendant STATE OF HAWAII is a state of the United States of America; THE UNIVERSITY OF HAWAII (hereinafter "University") is a corporation and a federally funded land-grant college existing under the laws of the State of Hawaii; and THE WILLIAM S. RICHARDSON SCHOOL OF LAW (hereinafter "School of Law" or "Law School") is a law school of the University of Hawaii.

9. Defendants connected with the State of Hawaii and the University of Hawaii have the duty under Hawaii Revised Statute Section 304-1 to govern the university in a manner consistent with an "available to all" policy mandated by the legislature. The University of Hawaii has been found by a lawful order of the U.S. District Court for the District of Hawaii dated January 22, 1985 (Hall vs. State of Hawaii, Civil No. 84-1072), to be an agency of the State of Hawaii. As an agency of the State of Hawaii, THE WILLIAM S. RICHARDSON SCHOOL OF LAW is bound by state law to comply with all of the terms and conditions of the State of Hawaii Administrative Procedures Act ("APA"), Chapter 91, and Public Agency Meetings and Records, Chapter 92, HRS.

10. Defendants operate as a public, tax supported, land-grant institution the only law school in the State of

Hawaii. The tuition of each person admitted to the School of Law is heavily subsidized by the state and federal governments. The School of Law at the University of Hawaii is accredited and is approved by the national Council of the American Bar Association on Legal Education and Admissions to the Bar. The University of Hawaii is engaged in interstate commerce and is a recipient of federal funds and largess.

11. The University is bound by the guidelines and instructions of the Law School Admissions Services, Inc. and the Law School Admission Counsel, Inc. when using LSAT test scores to grant or deny admission to the School of Law. The LSAC advises all law schools not to use LSAT test scores as the sole criterion for admission to the Law School.

12. The University is bound by by academic scientific ethical and moral considerations to refrain from conducting psychological, psychometric or admissions experimental testing on humans without the informed consent of the test subjects, all of whom with regard to LSAT tests, must be volunteers.

13. The University and the School of Law have a legal, ethical and moral duty to use only those tests in the admissions process, (1) where wholesale cheating has not occurred, (2) to make a reasonable and prudent effort to determine that cheating has not occurred with regard to LSAT test scores presented for admission, (2) that are valid according to psychometric standards and that do what they purport to do, (3) that do not subject non-volunteer humans to psychological or psychometric experimental testing without their informed consent according to standards such as those published in the Standards for Educa-

tional and Psychological Testing by the American Educational Research Association, American Psychological Association, National Council on Measurement in Education, and (4) that do not constitute an outright fraud on those applicants for admission who are required to take LSAT tests.

14. The University and the School of Law are bound by legal, ethical and moral considerations to avoid all discrimination based upon race, national origin, sex and age and to comply with Hawaii state law including the Hawaii Administrative Procedures Act (APA) in establishing and implementing forms, rules and regulations in the admissions process relating thereto.

15. The University and the School of Law are bound by legal, ethical and moral considerations and by its own pronouncements to implement forms, rules and regulations that foster openness and avoid secrecy and unwarranted subjective considerations in the admissions process.

16. This complaint constitutes an allegation of massive fraud, conspiracy and wrongdoing by the University and the School of Law and their officials, in their individual and official capacities, in the operation of the University of the School of Law with particular regard to the admissions process. This complaint constitutes but is not limited to an allegation that the University authorized and commissioned a committee to study the admissions process and then hid the full report from the public when the result proved embarassing to the University; the University by its own admission, discriminates with regard to race, national origin and economic circumstance in granting or denying admission to the School of Law; the University

knew or should have known that wholesale cheating is going on with regard to the LSAT test; the University participates, encourages and turns a blind eye to wholesale LSAT cheating; the University and the School of Law use an unlawful system or ranking applicants that permits the maximum subjective ranking of any publicly funded American university known to the plaintiff; the School of Law admissions committee is stacked in favor of recent graduates of local, public high schools and the University of Hawaii; the University and the School of Law manipulates admissions rankings based upon a subtle, shrewd and unlawful form of discrimination; that University pronouncements of openness and communication with the community amount to little more than verbal opium for the masses that cannot be believed by any rational person who has ever dealt with the University; the University and the School of Law promote an admissions program that makes some applicants and taxpayers more equal than other applicants and taxpayers without sufficient objective evidence to support their established policies; that the University and the School of Law demands to know the political affiliations and activities of all applicants; that real control of the admissions process lies outside the University and the School of Law; and the University and the School of Law have not complied with and are not in compliance with and refuse to comply with the Hawaii Administrative Procedures Act (APA), Chapter 91 or the Public Agency Meetings and Records Act, Chapter 92, HRS, despite demands from the plaintiff that they comply with both laws.

17. The plaintiff alleges that the University and the School of Law through their legal agent, James H. Dan-

nenberg, Deputy Attorney General, prior to the filing by the defendants of any pleadings before any court of law, deliberately and willfully slandered and libeled the plaintiff with the intent to defame, and with the intent to unconstitutionally and illegally invade the privacy of the plaintiff by unlawfully providing information including the plaintiff's LSAT score, to Ka Leo, the University of Hawaii newspaper, and to the daily press, for publication in violation of the Hawaii constitutional and applicable Hawaii state and federal laws protecting the rights of the plaintiff.

18. The plaintiff alleges that the University and the School of Law refuse to implement lawful procedures as required by law to redress grievances internally within the University and refuse to implement lawful procedures in the administration of the University and the School of Law; and the University Board of Regents refused and continue to refuse to hear the grievances of the plaintiff before or after the filing of litigation despite its lawful obligation to hear those grievances.

19. The plaintiff alleges that the University and the School of Law requires the submittal of the results of the LSAT exam by all applicants and thereby forces non-volunteer applicants to subject themselves to experimental psychometric and psychological experimentation on humans without the informed consent of the applicants. A major portion of the LSAT exam is experimental and is not counted toward the LSAT score. The makers of these tests are in a profit making business and enjoy enormous benefits as a proximate result of the coerced LSAT test taking. In addition, the University knew or should have known that the LSAT exam is a fraud and does not do

what it purports to do. The University and the School of Law unlawfully use the results of the LSAT exam to deny admission to applicants in violation of the explicit instructions of the makers of the LSAT exam.

20. The plaintiff has filed a prior action in the U.S. District Court for the District of Hawaii (Civil No. 84-1072) that contained some of the allegations contained in this complaint, but only with regard to his application for the 1984-85 Law School year. The following year, a new admissions committee was formed. The district court complaint is currently under appeal before the Ninth Circuit Court of Appeals after the district court granted the defendants summary judgment. Prior to summary judgment, the plaintiff withdrew all state law allegations barred by the Eleventh Amendment of the Constitution of the United States. This instant action covers the plaintiff's applications for both the 1984-85 school year and also his applications for the 1985-86 and 1986-87 school years. The decision of the appeals court (or any subsequent appeal) may or may not have an impact on this action which is being filed in order to save the plaintiff's statute of limitations time and in order to bring substantial amounts of new evidence to the attention of the state court, along with the state law allegations barred from federal court by the Eleventh Amendment, in conformance with the State of Hawaii's arguments before the district court.

21. THIS COMPLAINT CONTAINS STATE ALLEGATIONS AND CLAIMS FOR EVENTS AND INJURIES BARRED BY THE ELEVENTH AMENDMENT FROM FEDERAL COURT ADJUDICATION THAT WERE WITHDRAWN FROM FEDERAL COURT WITH THE AGREEMENT OF THE DEFEN-

DANTS; THIS ACTION CONTAINS ALLEGATIONS AND CLAIMS WITH REGARD TO EVENTS THAT OCCURRED SUBSEQUENT TO THE FILING OF THE DISTRICT COURT ACTION, AND THIS ACTION IS ALSO THE RESULT OF THE RECEIPT BY THE PLAINTIFF OF SUBSTANTIAL NEW, RELEVANT INFORMATION THAT THE DEFENDANTS HAVE ATTEMPTED TO HIDE FROM THE PLAINTIFF THAT THE PLAINTIFF DID NOT HAVE IN HIS POSSESSION WHEN CIVIL NO. 84-1072 WAS FILED.

COUNT I

22. Plaintiff was at the time of his application(s) for admission to the School of Law, a fifty or fifty one-year old, Caucasion, male, citizen and resident of the State of Hawaii since 1960, a B.G.S. graduate of Chaminade University of Honolulu, an accredited university, with distinction, and a 3.83 grade point average (maximum 4.00 scale), who desires to be admitted as a student to said university at the current fall session after the cause has been heard and determined without delay, in order to avoid irreparable harm. At the time of his second application for the 1985-86 school year, the plaintiff had completed three graduate level courses as an unclassified student with the School of Psychology at the University of Hawaii earning two A's and one B in those courses. At the time of his 1986-87 application, the plaintiff had completed most of the requirements for an M.S. degree in counseling psychology at Chaminade University of Honolulu. That course of study included psychological and psychometric testing. The plaintiff is ready, willing and able to pay the requisite uniform fees and conform to the *lawful* uniform rules and regulations for admission. The plaintiff is currently com-

pleting the requirement's for an M.S. degree in counseling psychology at Chaminade University of Honolulu and expects to graduate this summer.

23. On January 29, 1984, on February 25, 1985 and again on February 27, 1986, the plaintiff applied for admission to said University School of Law. Plaintiff complied with all the *lawful* instructions, rules and regulations of the University and the School of Law. On May 4, 1984 and at several other times subsequently, plaintiff supplied additional information to the School of Law Admissions Committee.

24. Plaintiff received a letters from Judith M. Kirkendall, Registrar and Director of Student Affairs dated May 7, 1984 and May 2, 1985 denying the plaintiff admission to the law scool. The 1986-87 application is still pending.

25. The information booklet of the School of Law outlines a Pre-Admission to Law School Program that provides "students from disadvantaged population groups under-represented in the Hawaii Bar with an opportunity to improve and to demonstrate their ability to do law school work. The students who are selected from among applicants with records not strong enough to justify admission into the regular program, must nonetheless show enough promise to indicate potential for successful completion of law study and significant contribution as lawyers." The only requirement to continue after the first year of work is a 2.00 grade point average with students earning a 1.6 to 1.99 grade point average admitted under probation.

26. An October 24, 1983 University Secret Admissions Review Committee Report obtained by the plaintiff

noted that the School of Law places "strong emphasis on three special areas with regard to all applications. First, whether the applicant has any particular skills which would qualify him to practice law in a specialty currently understaffed by the Bar. Thus, for example, someone who spoke fluent Korean or was particularly knowledgeable about the law of the sea would stand a better chance for admission. Second, applicants who come from racial and ethnic groups currently under represented in the Bar are also given special consideration. Finally, the duration and quality of residency in the State of Hawaii is considered a positive feature. The majority of the applicants are residents of Hawaii." The secret report further states that with regard to the Pre-Admissions Program the terms "economically and educationally disadvantaged" as a practical matter translate into motivated applicants who are other than Caucasion, Chinese, Japanese and Koreans.

27. Plaintiff alleges that "anything that departs from an unqualified and unlimited open policy implies some sort of ideology of preferences. And what one prefers, one tends to endow with merit." (Kraft, Ivor, *Race, Merit and the Fourteenth Amendment*) Such preferences are clearly unconstitutional, illegal under state and federal law and are prima facie evidence of the efficacy of the allegations of the plaintiff.

28. When a classification denies an individual opportunities or benefits enjoyed by others solely because of his or her race or ethnic background, it must be regarded as suspect. The University's admissions program of explicit racial classification has never been countenanced by any court. It tells applicants who are not "minorities" that no matter how superior or strong their qualifications, they

will never be allowed the chance to compete for admission with all other applicants. Racial and ethnic classifications are inherently suspect and call for exacting judicial scrutiny (see, *Bakke*).

29. In modern history, Hawaii has no history of discrimination towards minorities such as the discrimination the blacks were subjected to in the southern United States that warrants any preferential admissions policies or extraordinary measures whatsoever, and in any event, "preferential arrangements for minority students cannot be established on a permanent basis." (The Director of the Office of Civil Rights In Re: *DeFunis v. Odegaard* record, 82 Wash. 2d 11; 507 P. 2d 1169 (1973), *vacated per curiam as moot*, 416 U.S. 312; 94 S. Ct. 1704 (1974), pp. 1201-1203 and Kraft, Ivor, *Race, Merit and the Fourteenth Amendment*, p. 25.) Discrimination on racial grounds is always and invariably subject to the strictest scrutiny. (In Re: *Loving v. Virginia*, 388 U.S. 1 [1967]). "Judge Lloyd Shorett of the King County Superior Court, citing *Brown*, found that DeFunis had been deprived of equal protection of the laws under the Fourteenth Amendment, and ordered his admission to the Law School. 'In my opinion,' said Judge Shorett, 'the only safe rule is to treat all races alike and I feel that is what is required under the equal protection clause.'" (*DeFunis Record*, 116 and Kraft, Ivor, *Race, Merit and the Fourteenth Amendment*.) If educational corrections need to be made, the place to make them is at the secondary level, not at the graduate level. The only proper way to obtain an education is to *earn* it. Plaintiff has earned an opportunity for an education.

30. Plaintiff alleges that the defendants associated with the University of Hawaii and the State of Hawaii,

individually and collectively, have designed and are supporting a system of arbitrary, capricious, administrative action, along with unlawful procedures, discrimination and "stonewalling" with regard to any information on any aspect of this dispute. In addition, the University of Hawaii, despite disclaimers to the contrary, has no timely, established system of review, and there is no practical way to scrutinize or to challenge the admissions process despite strict state law guaranteeing open and fair rules and procedures.

31. The plaintiff alleges that the School of Law operates a "blackball" system with regard to admissions where all members of the admissions committee must agree or an application is not accepted. Any one member of the faculty can also effectively block an application.

32. Defendants have established and are maintaining, under color of unconstitutional rules of the University and laws of the State of Hawaii, a policy, custom, and usage of denying to qualified plaintiff applicant the equal protection of the laws by refusing him admission to the University School of Law on the basis of race, national origin or age through the device of protecting certain "slots" for those of specific race or national origin, and have continued the policy of refusing to admit qualified Caucasion, resident of Hawaii applicants into said School of Law, while at the same time admitting applicants on the basis or race or national origin with equal or less qualifications than plaintiff. The plaintiff has not been able to compete for all of the "slots" in the School of Law classes for two years in violation of the guidelines laid down by the U.S. Supreme Court in the *Bakke* decision.

33. The procedures of the Defendants as outlined in this complaint create a multi-layered, subtle, fine-mesh system of discrimination by which those applicants of a certain age who were born and raised in Hawaii, who graduated from secondary schools and who attended college in Hawaii and who are of a particular age, racial and/or national origin extraction, will more easily pass through the filter where older Caucasion residents of the State of Hawaii who did not attend and graduate from secondary schools in Hawaii will not enjoy the same equal opportunity to compete for all the seats in three years of Law School classes, tokenism and disclaimers not withstanding.

34. The plaintiff specifically alleges that the conduct of the defendants as officials in their official capacities clearly violates established statutory or constitutional rights of which a reasonable person would have known. The defendants are essentially the University of Hawaii, its School of Law and their respective officials as officials and as individuals, who are responsible for the implementation and the perpetuation of these unlawful and unconstitutional practices. Since this action involves the School of Law, and not a less legally informed agency such as the School of Medicine, the officials must be held to high standards for it is they who have a monopoly and the mandate in the State of Hawaii, to teach and maintain high standards of lawful conduct in the exercise of their duties.

35. As a proximate result of the malicious and unlawful acts of the defendants which plaintiff HALL has suffered as outlined in Count I, he should be awarded general damages on his behalf and against defendants in the amount of $50,000; with nominal, special, compensatory or actual damages in an amount to be proven at trial. In ad-

dition, as a proximate result of the unlawful, malicious, secretive, reckless and willful disregard and deprivation of the lawful and constitutional rights of the plaintiff and the public trust, HALL should be awarded punitive, or exemplary damages on his behalf and against the defendants jointly and severally in the amount of $500,000.

COUNT II

36. Paragraphs 1 through 35 are incorporated herein by reference. The defendants claim that they use a three-part method of evaluating applicants, LSAT score, undergraduate grade-point average (GPA) and subjective score. Most mainland publicly funded law schools use a system where the total number of points that can be obtained runs over 1,000 points. In the case of the Rutgers Law School the maximum number of points is 2,188, or 2,868 at the end of two stages, one of which includes a subjective evaluation. The Rutgers subjective evaluation is based solely upon (1) education, (2) work experience, (3) personal information including an essay, (4) a recommendation, and (5) grade inflation (see, *Doherty*, par. 37 below). The Hawaii system, however, has a total maximum of only 15 points, five points in each of the three categories. Most mainland public law schools that strive for fairness and objectivity no longer use a subjective score in the admissions process (see, PFYA score used at the University of Minnesota in *McAdams v. Regents of University of Minnesota*, 508 F.Supp. 354 [1981], at 357). The 1,000 to 2,000 points or so are computed under a formula involving only the LSAT score and the undergraduate GPA at some schools. Those schools who still use a subjective component use a procedure that is quite different from the procedure

used at the University of Hawaii, and is similar to that used at Rutgers. Their procedures do not permit subjective discrimination. Several schools weight the undergraduate GPA as counting proportionately more than the LSAT. The University of Hawaii School of Law has never published its criteria for subjective evaluations. That failure to disclose permits, of course, the maximum subjectivity in an evaluation.

37. In *Doherty* (see, *Doherty vs. Rutgers,* 651 F.2d 893 [3rd Cir. 1981]), standing to bring an action was determined on the basis that the addition of the maximum subjective score, 680 points, did not bring Doherty's score above the cut-off point for that year. In the instant case, the addition of the maximum subjective score would have brought the plaintiff well above the cut-off point for any year.

38. The system used in Hawaii is very shrewd. With a high point number system, the applicants are neatly spread in rank. With a total score of fifteen, most applicants are compressed into a limited number of ranks. The beauty of the Hawaii system in eliminating applicants, is that a second subjective choice can then be made by picking and choosing within a numerical rank crowded with applicants without *obvious* flagrant discrimination. The first discriminatory choices are made by manipulating the subjective score. Another discrimination occurs by overweighting LSAT scores that fall below the past "cut-off" point of 27. A score of 25 for example, is assigned a numerical score of —2, a very heavy weighting for only two points below the desired minimum or the alleged "cut-off" score of 27. The evaluation point assignment used at the

Law School is not spread evenly over the total LSAT point range of 0 through 48, and is enormously discriminatory in its application. The question of the use "cut-off" scores, a policy that the School of Law, is another issue in this complaint. When challenged on that point in *Robinson v. Williams* (University of Mississippi Law School), Civil No. WC 74-66-K (N.D. Miss.), the University of Mississippi Law School immediately caved in and reported, "The Law School has ceased to use any minimum LSAT score in the admission process". None of this information has ever been published or made uniformly public to applicants. In the plaintiff's case, a maximum subjective score of 5 added to his undergraduate grade point average score of 5 would have given him a 10 score. The application of a negative score with regard to the LSAT score is challenged herein, but even if this system survives challenge, the application of the -2 would have given the plaintiff an 8 score, well within the scores of those accepted for admission in both admissions years. This information with regard to the system used by the Law School was obtained from an affidavit filed in Civil No. 84-1072 in U.S. District Court, and is without prejudice to discovery or cross-examination by the plaintiff. Not only is the School of Law admissions system shrewd, it amounts to an arrogant, unlawful, private use of public funds.

39. Hawaii separates itself from many mainland law schools another way. The Law School Admissions Counsel (LSAC) has published firm instructions that the LSAT should not be used as the sole criteria for admission or the denial of admission. The reason for this instruction is that the LSAT is not a valid predictor of first year law school success. Validity improves (but is still terrible)

if the LSAT is matched with the undergraduate GPA. Hawaii ignores that LSAC caution and gets rid of many of those it does not subjectively want by an LSAT cut-off point and by overweighting with minus scores, those who fall below 27. That cut-off is apparently adjusted and for the last two years, has stood at 27. One way is just effective as the other for using the LSAT score to eliminate applicants. There were exceptions, of course, for those who had special merit. None of this information is published or routinely provided to prospective applicants.

40. The manner in which the University of Hawaii uses LSAT scores in the admissions process is unlawful for several reasons. The first is the perception that most people have as to what the LSAT test (or any other Educational Testing Service [ETS] test) is. The LSAT exam tests how well a person does on the LSAT exam and nothing more. The LSAT test is not an aptitude test. The test is a massive fraud, pure and simple. That fraud has never been adjudicated on the merits in any court. The vast majority of those who do well on the LSAT exam do well by simply cheating by taking a coaching course. National LSAT statistics are invalid for several reasons including the availability of superior coaching courses in major metropolitan areas and the fact that the random selection statistical basis of the test is destroyed by that coaching and several other psychometric reasons. The coaching courses teach students how to cast out the wrong answers by process of elimination without ever knowing why the right answer is right. The better coaching courses have determined by computer analysis, several patterns in LSAT test construction which can easily be

taught to students who spend weeks of their time and who pay a substantial fee. Nothing is learned in the process except how to beat the test. By definition, such a test cannot be called an aptitude test. By the statistics published by its authors (known as correlation statistics), the exam is also a fraud since it simply does not do what those who use it purport it will do. It does not fairly predict first year law school performance, a fact well known in psychometric circles.

41. As a proximate result of the malicious and unlawful acts of the defendants which plaintiff HALL has suffered, he should be awarded general damages on his behalf and against defendants in the amount of $50,000; with nominal, special, compensatory or actual damages in an amount to be proven at trial. In addition, as a proximate result of the unlawful, malicious, secretive, reckless and willful deprivation and disregard of the lawful and constitutional rights of the plaintiff and the public trust, HALL should be awarded punitive, or exemplary damages on his behalf and against the defendants jointly and severally in the amount of $500,000.

COUNT III

42. Paragraphs 1 through 41 are incorporated herein by reference. The plaintiff has made several lawful attempts to determine the validity of the admissions procedures used at the University under the APA, Chapter 91, and Chapter 92, HRS. One such attempt was made on October 5, 1985 direct to the President of the University of Hawaii, Albert J. Simone and another was made on December 11, 1985 to Judith M. Kirkendall, Registrar and

Director of Student Affairs at the William S. Richardson School of Law.

43. Despite the applicability of the APA to all agencies of the State of Hawaii and the finding of the U.S. District Court for the District of Hawaii on January 22, 1985 that the University is an agency of the State of Hawaii, the University and the School of Iaw have at all times, refused and failed to respond to the lawful requests of the plaintiff to provide evidence that the rules and regulations including the admissions procedures used at the University and the School of Law were adopted in lawful compliance with the APA, Chapter 91, HRS.

44. The plaintiff alleges that the rules and regulations of the University in general, and specifically the admissions procedures utilized to exclude the plaintiff from the School of Law, have not been adopted in lawful compliance with the APA, Chapter 91, HRS.

45. The plaintiff requests declaratory judgment; that this court issue a judicial declaration as to the validity of the rules and regulations and other requests outlined in the October 5 and December 11, 1985 letters, and declare all University and School of Law admissions rules and regulations invalid that violate constitutional or statutory provisions, or exceed the statutory authority of the agency, or were adopted without compliance with statutory rulemaking procedures, in accordance with Section 91-7, HRS.

COUNT IV

46. Paragraphs 1-45 are incorporated herein by reference. On August 7, 1984, the plaintiff made a request under HRS Section 92-51 and 92-21, Public Record Access

& Copying Request. The request was made to Marvin J. Anderson, in his capacity as Chancellor, University of Hawaii. The request was ignored.

47. The plaintiff requests that a hearing be scheduled, and the court find that the denial was not for just and proper cause, and that the court grant an order under part 92-52 ordering the appropriate official at the University to provide the documents requested in the August 7, 1984 letter.

COUNT V

48. Paragraphs 1-47 are incorporate herein by reference. In September of 1984, counsel for the defendants James H. Dannenberg spoke to the press about the U.S. District Court case. These contacts occurred after the plaintiff had filed Civil No. 84-1072 in U.S. District Court, but occurred prior to the filing of any pleadings of any kind by the defendants in the U.S. District Court. One member of the press that Mr. Dannenberg spoke to was a reporter by the name of Norman Lee, a reporter for Ka Leo O Hawaii, the University of Hawaii newspaper. In that discussion, Mr. Dannenberg provided Mr. Lee with the information that the plaintiff's LSAT score was 25, "two points below the UH law school's established minimum requirement score". Mr. Dannenberg obtained that information from the plaintiff's confidential, personal University records with the cooperation of and in a conspiracy with University officials. That information supplied by Mr. Dannenberg was published by Ka Leo on September 14, 1984 in a front page, headlined article by Mr. Lee.

49. The information concerning the LSAT score supplied by Mr. Dannenberg to Mr. Lee for publication was not only as an invasion of the plaintiff's constitutional and lawful right to privacy, but also was a deliberate attempt to libel and slander with the intent to defame, the plaintiff.

50. As a proximate result of the malicious and unlawful acts of the defendants outlined in Count IV which plaintiff HALL has suffered, he should be awarded general damages on his behalf and against defendants in the amount of $50,000, nominal, special, compensatory or actual damages in an amount to be proven at trial. In addition, as a proximate result of the unlawful, malicious, secretive, reckless and willful deprivation and disregard of the lawful and constitutional rights of the plaintiff and the public trust, HALL should be awarded punitive, or exemplary damages on his behalf and against the defendants jointly and severally in the amount of $500,000.

COUNT VI

51. The plaintiff specifically alleges that the defendants have conspired under the definition of 42 U.S.C. Section 1985(3) and 1986 for the purpose of depriving the plaintiff, directly and indirectly, of equal protection of the law, that the defendants as conspirators committed the acts alleged in this complaint in furtherance of the conspiracy, and that the plaintiff has been injured in the form stress and mental suffering, he has been deprived of the property right to an education, and he has been deprived of having and exercising the rights or privileges of a citizen of the United States as are outlined in this com-

plaint. The plaintiff alleges that the defendants had actual knowledge of the discriminatory act by virtue of but not limited to the filing of Civil No. 84-1072 in U.S. District Court, and by virtue of correspondence, meetings and telephone conversations with the plaintiff.

52. As a proximate result of the malicious and unlawful acts of the defendants in Count VI which plaintiff HALL has suffered, he should be awarded general damages on his behalf and against defendants in the amount of $50,000; and nominal, special, compensatory or actual damages in an amount to be proven at trial. In addition, as a proximate result of the unlawful, malicious, secretive, reckless and willful deprivation and disregard of the lawful and constitutional rights of the plaintiff and disregard of the public trust, HALL should be awarded punitive, or exemplary damages on his behalf and against the defendants jointly and severally in the amount of $500,000.

COUNT VII

53. Paragraphs 1-52 are incorporated herein by reference. Defendants have established and are maintaining, under color of unconstitutional laws or rules of the State of Hawaii, a policy, custom, and usage of denying to the qualified Caucasion plaintiff applicant the equal protection of the laws and are engaging in acts of violation of the state anti-trust laws, acts of restraint of trade, conspiracy and monopoly by refusing the plaintiff the educational opportunity to qualify for the employment of the practice of law in the State of Hawaii, while at the same time admitting applicants with equal or less qualifications than plaintiff. Applicants who are admitted and who graduate

qualify to take the Bar examination. Plaintiff does not qualify under current, unconstitutional rules, to take the Bar examination and to practice as a licensed attorney in the State of Hawaii.

54. The federal courts have held that whatever various states may require before allowing applicants to take the Bar examination, so long as they are applicable to every citizen alike, it should be of no concern to the federal (and presumably state) courts. The plaintiff alleges that with the unique (among all the fifty states) central political and administrative control that the state administration exerts in all aspects of governmental life in Hawaii, admission to the only ABA approved Law School in the State of Hawaii is very much a part of this process, and the applicable rules and regulations are not applicable to every citizen alike (see, *Hackin v. Lockwood*, 361 F.2d 499 [1966]). The applicable rules and regulations in Hawaii create a system where some citizens are unlawfully treated very specially and with enormous discrimination over other citizens.

55. The said action of defendants will effectively bar plaintiff from the lucrative practice of law now closed to him because of a lack of graduation from a law school approved by the Council of the American Bar Association on Legal Education and Admissions to the Bar, and will be obliged to accept less remunerative employment. "As the High Bench remarked in *Brown*, 'education is perhaps the most important function of state and local governments.' and debates over education sometimes go deeper than debates on race." (Kraft, Ivor, *Race, Merit and the Fourteenth Amendment.*)

56. The said action of defendants also denies the plaintiff the right and privilege to obtain a heavily subsidized law education in said law school; it places plaintiff at great disadvantage with regard to obtaining a law education within said state, as compared with other residents and non-residents of said state; it amounts to denial to plaintiff, a citizen of the United States and of the State of Hawaii, and others similarly situated of liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Hawaii. The courts have held that denials of licenses can be viewed about equally as well as complaining of a deprivation of the personal liberty to pursue the calling of one's choice or of the profits or emoluments deriving therefrom (see, *Eisen v. Eastman,* 421 F.2d 560 [1969]). In the instant case, the state requires graduation from their ABA approved School of Law, the only one in the State of Hawaii, as a prerequisite to application for a license to practice law, or to take the bar examination which is also a prerequisite to licensing.

57. Plaintiff has been damaged in that his pleadings have been stricken in Civil No. 85-0151 (Order Striking all Pleadings Filed by Robert W. Hall and/or Bertha S. Hall on Behalf of the Hall Trusts and Enjoining the Further Unauthorized Practice of Law filed February 4, 1986, Circuit Court of the First Circuit, State of Hawaii), apparently as a sanction for the alleged unlicensed representation of inter-vivos trusts for his son where he and his wife retain a personal interest in the trusts. Civil No. 85-0151 is a foreclosure action with regard to the plaintiff's principal residence. Plaintiff alleges that the unlawful and

proximate acts of the defendants as alleged in this action deprive the plaintiff of his lawful and constitutional right to defend, and the legal knowledge to defend, his personal and family interests, and that as a result, the defendants herein must be held accountable for the damages that have occurred and will likely occur to the plaintiff by their unlawful actions, including responsibility for the imminent foreclosure of their principal residence, and future, similar injuries.

58. As a direct and proximate result of the acts of the defendants, the plaintiff is suffering irreparable injury and is threatened with irreparable injury in the future by reason of the acts herein mentioned. Plaintiff has no timely, practical, plain, adequate remedy to redress the wrongs and illegal acts herein complained of other than this suit for a declaration of rights, damages and an injunction. Any other remedy to which plaintiff could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, cause further irreparable injury, and occasional damages, vexation, and inconvenience, not only to plaintiff, but to defendants as governmental agencies.

59. As a proximate result of the malicious and unlawful acts of the defendants outlined in Count V which plaintiff HALL has suffered, he should be awarded general damages on his behalf and against defendants in the amount of $50,000, nominal, special, compensatory or actual damages including interest in an amount to be proven at trial. In addition, as a proximate result of the unlawful, malicious, secretive, reckless and willful disregard of the lawful and constitutional rights of the plaintiff and the

public trust, HALL should be awarded, punitive, or exemplary damages on his behalf and against the defendants jointly and severally in the amount of $500,000, all damages trebled or otherwise multiplied in accordance with applicable law.

Wherefore, plaintiffs respectfully pray that:

1. This court adjudge, decree, and declare the rights and legal relations of the parties to the subject matter here in controversy, in order that such declaration shall have the force and effect of a final judgment or decree.

2. This court enter a judgment or decree declaring that the said admissions policy, custom, usage, rules, regulations and practice of the defendants in denying plaintiff the right to enroll, enter, and pursue courses of study at the School of Law at the University of Hawaii on account of his age, race or national origin, or any other unlawful consideration, is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and is therefore unconstitutional or unconstitutional or is illegal under applicable state or federal law, as an unlawful admissions policy or as the admissions policy was applied specifically to the plaintiff.

3. This court issue a permanent injunction forever restraining and enjoining defendants and each of them, from denying plaintiff the right to enroll and pursue courses of study at the School of Law at the University of Hawaii on account of the failure of the University and the School of Law to comply with Chapters 91 & 92, HRS (see, 56 H. 680, 548 P.2d 253); his age; his length of residence in the State of Hawaii; the location of the sec-

ondary schools or colleges he did or did not attend; his letters of reference or lack thereof; his community service or lack thereof; his race; his national origin; or any other unconstitutional or illegal subjective factors or any requirement not legally published under Chapter 91, HRS, in the information booklet of the Law School of the University of Hawaii.

4. In the alternative, that this court issue a permanent injunction prohibiting the University of Hawaii from using the current School of Law admissions procedure while finding the entire admissions process for the 1984-85, 1985-86 and 1986-87 school years unconstitutional, illegal, null and void.

5. That in the alternative, this court then issue a writ of mandamus requiring the University of Hawaii to re-select applicants to the School of Law for the 1984-85, 1985-86 or 1986-87 school years from a group of applicants who are legal residents of the State of Hawaii who meet whatever lawful admissions requirements remain, by lot or by any other lawful means, and one of that group shall be the plaintiff.

6. That in the alternative, this court issue a writ of mandamus compelling defendants to register plaintiff as a first year student at the coming fall semester of the School of Law of the University of Hawaii.

7. That this court enter a judgment or decree declaring that the said Hawaii Revised Statute Section 605-14, conspiracy, custom, usage and practice of the defendants Supreme Court of the State of Hawaii with regard to the "unauthorized practice of law", is a denial of the equal protection of the laws as guaranteed by the First,

Ninth and Fourteenth Amendments to the Constitution of the United States and in violation of the federal and state anti-trust, monopoly and restraint of trade laws cited herein, and is therefore unconstitutional, illegal, null and void under the existing federal and state laws, above-named.

8. That this court issue a permanent injunction forever restraining and enjoining defendants and each of them, from denying plaintiff the right to represent with their consent, any member of his family before any federal or state court of law in the State of Hawaii.

9. That this court enter a judgment in favor of the plaintiff against defendants jointly and severally for nominal, special, compensatory or actual damages jointly and severally in an amount to be proven at trial, general damages of $250,000 and punitive or exemplary damages of $2,500,000, trebled where applicable.

10. Plaintiff further prays that the court allow him his costs and compensation for his time in appearing as his own attorney at the reimbursement of $75.00 per hour, and such further, other, additional, or alternative relief as may appear to the court equitable and just.

JURY DEMAND

Plaintiff hereby demands trial by jury pursuant to all the provisions of Rule 38(b) of the Hawaii Rules of Civil Procedure.

DATED: Honolulu, Hawaii, May 2, 1986.

/s/ Robert W. Hall
ROBERT W. HALL, Pro Se

APPENDIX "C"

CORINNE K. A. WATANABE 1429
Attorney General
State of Hawaii

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Attorneys for Defendants

(Filed July 27, 1986)

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

CIVIL NO. 86-1646

MOTION TO DISMISS, OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT OF MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT; AFFIDAVIT OF JAMES H. DANNENBERG; AFFIDAVIT OF JEREMEY T. HARRISON; AFFIDAVIT OF STEVEN S. MICHAELS; NOTICE OF HEARING OF MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT; AND CERTIFICATE OF SERVICE.

NO TRIAL DATE SET

DATE: JULY 29, 1986

TIME: 9:30 A.M.

JUDGE: EDWIN R. HONDA

[caption deleted in printing]

MOTION TO DISMISS, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Come now Defendants, in their individual and official capacities, by and through their undersigned attorneys, and pursuant to Rules 7(b)(1), 12(b)(1), 12(b)(2), 12(b)(6), 54(b), 56(b), and 56(d), Hawaii R. Civ. P., hereby move to dismiss any and all claims asserted in this action or such claims as are subject to dismissal, or, in the alternative for summary judgment as to any and all claims asserted in this action, or such claims as to which summary judgment may be granted.

Defendants or any of them also seek an express determination that there is no just reason for delay in the entry of judgment, pursuant to Rule 54(b), Hawaii R. Civ. P., in the event such a determination should be appropriate.

Defendants or any of them also seek the Court's determinations pursuant to Rule 56(d) as to what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, if such determinations are appropriate.

This motion is based upon the Hawaii Rules of Civil Procedure cited above, the Constitution, statutes, and law of the United States and the State of Hawaii, the attached memorandum and affidavits, and the record and files herein.

Dated: Honolulu, Hawaii, June 27, 1986.

CORINNE K.A. WATANABE
Attorney General

/s/ Steven S. Michaels
STEVEN S. MICHAELS
Deputy Attorney General
Attorneys for Defendants

APPENDIX "C(1)"

ROBERT W. HALL
583 Kamoku Street, #2605
Honolulu, Hawaii 96826
(808) 942-1766
Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ROBERT W. HALL, an individual,

Plaintiff,

vs.

STATE OF HAWAII, a State of the United States, UNIVERSITY OF HAWAII, a Hawaii corporation and a land-grant college, THE WILLIAM S. RICHARDSON SCHOOL OF LAW, a division of the University of Hawaii, ALBERT J. SIMONE, as an individual and in his capacity as President of the University of Hawaii, STEPHEN G. BESS, as an individual and as a Regent of the University of Hawaii, GLADYS A. BRANDT, as an individual and as a Regent of the University of Hawaii, GREGORY DELA CRUZ, as an individual and as a Regent of the University of Hawaii, JULIA FROHLICH, as an individual and as a Regent of the University of Hawaii, ROBERT M. FUJIMOTO, as an individual and as a Regent of the University of Hawaii, JAMES G. GARY, as an individual and as a Regent of the University of Hawaii, DANIEL M. ISHII, as an individual and as a Regent of the University of Hawaii, KENNETH N. KATO, as an individual and as a Regent of the University of Hawaii, STANLEY Y. MUKAI, as an individual and as a Regent of the University of Hawaii, WALTER R. STEIGER, as an individual and as a Regent of the University of Hawaii, BURT K. TSUCHIYA, as an individual and as a Regent of the University of Hawaii, TATSUKI SHIRAMIZU, as an individual and as Secretary of the Board of Regents

of the University of Hawaii, MARVIN J. ANDERSON, as an individual and as Chancellor of the University of Hawaii, RICHARD S. MILLER, as an individual and as Dean of the School of Law, JUDITH M. KIRKENDALL, as an individual and as Registrar and Director of Student Affairs of the School of Law, WILLIAMSON B.C. CHANG, as an individual and as a member of the Admissions Committee of the School of Law, IRENE RYPINSKI, as an individual and as a member of the Admissions Committee of the School of Law, LAWRENCE H. KAM, as an individual and as a member of the Admissions Committee of the School of Law, BODE UALE, as an individual and as a member of the Admissions Committee of the School of Law, WILLIE DOMINGO, as an individual and as a member of the Admissions Committee of the School of Law, DEAN KAUKA, as an individual and as a member of the Admissions Committee of the School of Law, THE SUPREME COURT of the State of Hawaii, HERMAN LUM, as an individual and as Chief Justice of the Supreme Court of the State of Hawaii, EDWARD NAKAMURA, as an individual and as an Associate Justice of the Supreme Court of the State of Hawaii, FRANK PADGETT, as an individual and as an Associate Justice of the Supreme Court of the State of Hawaii, YOSHIMI HAYASHI, as an individual and as an Associate Justice of the Supreme Court of the State of Hawaii, JAMES WAKATSUKI, as an individual and as an Associate Justice of the Supreme Court of the State of Hawaii, JOHN DOES 1-20, JANE DOES 1-20, DOE PARTNERSHIPS 1-20, DOE CORPORATIONS 1-20, DOE GOVERNMENTAL ENTITIES 1-20, and DOE ENTITIES 1-20,

Defendants.

C-6

CIVIL NO. 84-1072

AMENDED COMPLAINT FOR DAMAGES, DECLARATORY AND INJUNCTIVE RELIEF OR IN THE ALTERNATIVE AN APPLICATION FOR WRIT OF MANDAMUS

(Filed Oct. 4, 1984)

NOTICE

THIS AMENDED COMPLAINT AMENDS THE PLEADING ONLY. THE ORIGINAL EXHIBITS ATTACHED TO THE ORIGINAL COMPLAINT REMAIN A PART OF THE ORIGINAL COMPLAINT AS AMENDED.

The plaintiff ROBERT W. HALL, pro se comes now with this complaint and petitions this court for an injunction or in the alternative, for a writ of mandamus against the above-named defendants in their official capacity, and also in their individual capacities, and as reasons and grounds therefore, plaintiff alleges the following facts:

1. The jurisdiction of this court is invoked under Title 28, United States Code (hereinafter "U.S.C."), Section 1331 and this court's pendent and ancillary jurisdiction. This action arises under Article I, Section 8; the First, Fifth and Fourteenth Amendments to the Constitution of the United States; and the laws of the United States including but not limited to the Civil Rights Act of 1866, 1870, and 1871; Title IX of the Education Amendments of 1972; Title I of the Civil Rights Act of 1968; Titles VI and VII of the Civil Rights Act of 1964; Title 42, U.S.C., Sections 1981, 1982, 1983 and 1985, all of the above as amended and as hereinafter more fully appears. The matter in controversy exceeds, exclusive of interest and costs, the sum of ten thousand dollars.

2. The jurisdiction of this court is also invoked under Title 28, U.S.C., Section 1343, this being a suit in equity authorized by law to be brought to redress the deprivation under color of unconstitutional state law, statute, regulation, custom and usage of a state of rights, privileges, and immunities secured by the laws and Constitution of the United States, viz., Sections 1981, 1982, 1983 and 1985 of Title 42 of the United States Code and the Fourteenth Amendment to the Constitution of the United States providing for the equal rights of citizens and of all other persons within the jurisdiction of the United States, as amended and as hereinafter more fully appears.

3. The jurisdiction of this court is also invoked under Article I, Section 4, Due Process and Equal Protection; Article I, Section 6, Rights of Citizens; Article II, Section 20, Construction, Article III, The Legislature, Section 1, Legislative Power; Article V, Section 5, The Judiciary, Administration; Article IX, Education, Section 1, Public Education; Section 4, University of Hawaii; Section 5, Board of Regents; Powers, providing for equal rights of citizens and all other persons within the jurisdiction of the State of Hawaii; the Hawaii Fair Employment Practice Law, Title 21, Chapter 378-1 et seq., Hawaii Revised Statutes; state and federal common law, and contract law; all of the above as amended and as hereinafter more fully appears.

4. The jurisdiction of this court is also invoked under Title 28, U.S.C., Section 1337, the district courts having original jurisdiction or proceeding regulating commerce or protecting trade and commerce against restraints and monopolies invoked under the Sherman Anti-Trust Act,

Public Law No. 190, Public Law 93-528 and the Hawaii Revised Statutes, Trade Regulation and Practice, Monopolies; Restraint of Trade, Section 480-4(a) and Section 480-9.

5. Plaintiffs show further that this is a proceeding for a declaratory judgment and injunction under Title 28, U.S.C., Section 2201, for the purpose of determining a question in actual controversy between the parties, to wit, whether the practice of the defendants in denying plaintiff, on account of equal opportunity, his age and his race, the right to be admitted to and pursue courses of study at the state and federally supported University of Hawaii constitutes a denial of the right of the plaintiff to the equal protection of the laws under the Fourteenth Amendment to the United States Constitution and the laws of the United States and the State of Hawaii.

6. All of the parties to this action, both plaintiff and defendants, are citizens of the United States and the State of Hawaii, and are residents of and domiciled in said state.

7. Defendant ALBERT J. SIMONE is the duly appointed, qualified and acting President of said university, and as such governs and controls the several colleges and schools of said university by the power vested in him by the Board of Regents; STEPHEN G. BESS, GLADYS A. BRANDT, GREGORY DELA CRUZ, JULIA FROHLICH, ROBERT M. FUJIMOTO, JAMES G. GARY, DANIEL M. ISHII, KENNETH N. KATO, STANLEY MUKAI, WALTER R. STEIGER, BURT K. TSUCHIYA, and TATSUKI SHIRAMIZU are all Regents of the said university with power under the Hawaii Revised Statute section 26-11, to formulate policy, and to exercise

control over the university through its executive officer, the president of the university; MARVIN J. ANDERSON is the Chancellor of the Manoa campus of the University of Hawaii and possesses the power and the responsibility to appoint investigatory committees and to review the actions of the Admissions Committee of the School of Law; RICHARD S. MILLER is the Dean of the School of Law who makes a final review of the recommendations of the Admissions Committee; JUDITH M. KIRKENDALL is the Registrar and Director of Student Affairs who makes the recommendations to the Admissions Committee with regard to initial qualifications or disqualification; WILLIAMSON B. C. CHANG, IRENE RYPINSKI, LAWRENCE H. KAM, BODE UALE, WILLIE DOMINGO, and DEAN KAUKA are the six members of the Admissions Committee of the School of Law who possess the authority to pass upon the eligibility of applicants who seek to enroll as students therein, including plaintiff; HERMAN LUM is the Chief Justice of the THE SUPREME COURT of the State of Hawaii, EDWARD NAKAMURA, FRANK PADGETT, Y. HAYASHI and JAMES WAKATSUKI are Associate Justices who require that plaintiff be a graduate of a law school approved by the Council of the American Bar Association on Legal Education and Admissions to the Bar in order to practice before the Supreme Court of the State of Hawaii; Defendant STATE OF HAWAII is a state of the United States of America; THE UNIVERSITY OF HAWAII is a corporation and a federally funded land-grant college existing under the laws of the State of Hawaii; THE WILLIAM S. RICHARDSON SCHOOL OF LAW is a law school of the University of Hawaii; and THE SU-

PREME COURT of the State of Hawaii is the judiciary authority of the State of Hawaii.

8. Defendants connected with the State of Hawaii and the University of Hawaii have the duty under Hawaii Revised Statute Section 304-1 to govern the university in a manner consistent with an "available to all" policy mandated by the legislature. Defendants operate as a public, tax supported, land-grant institution the only law school in the entire State of Hawaii. The School of Law at the University of Hawaii is accredited and is approved by the Council of the American Bar Association on Legal Education and Admissions to the Bar. The University of Hawaii is engaged in interstate commerce and is a recipient of federal funds and largess.

9. Plaintiff is a fifty-year old, Caucasion, male, citizen and resident of the State of Hawaii since 1960, a B.G.S. graduate of Chaminade University of Honolulu with distinction and a 3.90 grade point average, who desires to be admitted as a student to said university at the current fall session after the cause has been heard and determined without delay, in order to avoid irreparable harm. The plaintiff is ready, willing and able to pay the requisite uniform fees and conform to the lawful uniform rules and regulations for admission.

10. In 1983, plaintiff wrote to the School of Law for a catalog and an Application for Admission. Plaintiff received the catalog or information booklet, the Instructions for Application Form, an Application for Admission and two Letter of Recommendation forms. (See, Exhibit "A", attached)

11. On January 29, 1984, plaintiff applied for admission to said university. Plaintiff complied with all the lawful instructions, rules and regulations contained in the information booklet, in the Instructions for Applicant Form and on the Application for Admission form sent to the plaintiff by the School of Law, entitling him to admission, by filing with the proper officials of the university the requested completed forms, official transcripts of his scholastic records direct from the schools, colleges and universities attended, and by filing the required two letters of recommendation or Applicant Appraisal Form (See, Exhibit "B" attached). On May 4, 1984, plaintiff supplied additional information to the School of Law Admissions Committee to the effect that he expected to graduate from Chaminade University of Honolulu in June 1984 "with distinction" and with a grade point average of 3.90. (See, Exhibit "C", attached.)

12. On May 8, 1984, plaintiff received a letter from Judith M. Kirkendall, Registrar and Director of Student Affairs dated May 7, 1984 that denied the plaintiff admission to the law school. That letter contained a deliberately misleading statement that the Admissions Committee "carefully examined the qualifications of all the applicants--more than five for each of the spaces in this year's entering class." (See, Exhibit "D", attached) In fact, most applications are routinely eliminated on residency grounds. (See, Exhibit "E", attached.)

13. On June 15, 1984, plaintiff wrote to the Registrar Ms. Kirkendall requesting "a clear, precise statement of exactly what the requirements are to be admitted to the Law School, whether waivers are ever granted and

under what conditions waivers are granted with regard to the requirements for admission, and exactly how I failed to meet those requirements." The letter further went on, "I need this information to correct any areas where I have not met the standards required of all applicants. As you know, the road to reach the point where a person is eligible to simply apply to Law School is long and costly in both time and money. I did not find the catalog or the material that was sent to me informative and I now ask for the information that anyone should have who is applying for admission to the Law School." (See, Exhibit "F", attached) On July 16, 1984, Plaintiff received a letter from Ms. Kirkendall that was not responsive to the original request. (See, Exhibit "G", attached) At about that time, plaintiff also met with Chancellor Marvin J. Anderson with regard to his Application for Admission to the School of Law. At that meeting, Chancellor Anderson promised to arrange a meeting between plaintiff and the Dean of the School of Law, Richard S. Miller. No meeting was ever arranged by the Chancellor. Plaintiff did meet briefly with the Dean Miller plaintiff's own initiative and was unable to resolve the dispute. The Chancellor has subsequently refused to answer all telephone calls from plaintiff.

14. On August 7, 1984, plaintiff wrote to Chancellor Anderson requesting "full, immediate and complete investigation of the handling of my application with a resolution to the problem well before the first day of classes. . . . If any machinery exists at the university that will handle the current situation out of court, I request that it be used without delay." (See, Exhibit "H", attached)

Chancellor Anderson never replied to that letter. On August 7, 1984, plaintiff requested a reconsideration of plaintiff's Application for Admission to the School of Law and submitted additional information with regard to his years of community service. (See, Exhibit "I", attached.) After a meeting with the Registrar where it was suggested that plaintiff provide "ten" additional letters of recommendation. Plaintiff attempted to comply with that curious request and made requests in the community for additional letters of recommendation for direct submittal to the Registrar. (See, Exhibit "P", attached.)

15. On August 8, 1984, Ms. Kirkendall wrote to plaintiff indicating in that letter and in subsequent personal and telephone conversations that the Admissions Committee would reconsider plaintiff's Application for Admission. (See, Exhibit "J", attached)

16. On August 17, 1984, Dean Miller wrote to plaintiff stating that contrary to previous understandings, the Admissions Committee would not reconsider plaintiff's Application for Admission. (See, Exhibit "K", attached)

17. On August 23, 1984, plaintiff wrote to the Director of Student Services to appeal the decision of the Admissions Committee of the School of Law in accordance with the procedure outlined in the University of Hawaii Graduate Information Bulletin. (See, Exhibit "L", attached)

18. In subsequent telephone conversations, plaintiff learned that the committee when formed, would only have the power to recommend action to the Chancellor who would not attend the hearings or listen to the evidence,

that the committee could not offer any assurance of timely due process or review to the plaintiff and that the scope of authority of the committee would be too narrow and limited to offer relief practical relief assuming the plaintiff proved his case. As late as September 1, 1984, the first meeting had not been held between the committee and the plaintiff. Plaintiff concluded that the University of Hawaii had no effective, orderly system of review of appeal, that the University of Hawaii was not in a position to grant relief commensurate with the claim, that the relief would not be available within a reasonable time, that the procedures were one-sided and not fair, that the committee was only formed to perform perfunctory appearances of relief as opposed to actual relief and that the relief sought could not be provided by the committee in order to prevent irreparable injury, and to preserve the Section 1983 rights of the plaintiff until the administrative process was concluded.

19. The Admissions Requirements and Procedures as listed in the information booklet and on the Instructions for Application Form include only two substantive requirements for admissions to the School of Law other than submitting the forms and the application fee. They are found on page 43 of the booklet (See, Exhibit "A", attached.) and are that each applicant must have earned a baccalaureate degree from an accredited United States Institution of higher learning, that each applicant must take the Law School Admission Test (LSAT), that each applicant must submit transcripts of his undergraduate college record to the Law School Date Assembly Service for processing, and that each applicant must submit two letters of recommendation on the approved form. No

other requirements for admission are required according to the School of Law and applicants are instructed that personal interviews "are not considered a part of the application procedure" and "Committee members will appreciate reasonable brevity" with regard to filling out the application.

20. Plaintiff completed and submitted all of the required forms and supplied the application fee and all the required documents prior to the deadline for filing. (See, Exhibit "B", attached.) Plaintiff has not received any indication that his application was incomplete and he believes that his application was complete.

21. Plaintiff met all of the requirements as outlined in the information supplied to the plaintiff by the School of Law for admission to the School of Law. If the university has adopted any standards beyond those found in the information booklet, they have never been communicated to the applicant. Plaintiff alleges that the catalog is an offering in the nature of a contract which the plaintiff accepted in good faith, meeting all the published requirements, and now demands performance on the part of the School of Law.

22. On August 7, 1984, plaintiff wrote to Chancellor Anderson with a Hawaii Revised Statute Section 92-51 and 92-21, Public Record Access & Copying Request where plaintiff requested a copy of the independent committee report on admissions that was released to the public in 1983. Plaintiff also requested a copy of the Board of Regents By-Laws and Policies. (See, Exhibit "M", attached.) That letter has never been answered and the Chancellor will not receive or return telephone calls on

the subject. The independent committee report was also requested from Dean Miller who also refused to provide the information. Plaintiff has since obtained a copy of the independent committee report from another source. (See, Exhibit "E", attached.) Defendant Chancellor Anderson has refused to provide this report to the press. (See, Exhibit "N", attached.) Plaintiff has also requested his final ranking with regard to the subjective score assigned to the plaintiff by the Registrar or the Admissions Committee. The Registrar has refused to provide that information to the Plaintiff.

23. The information booklet of the School of Law outlines a Pre-Admission to Law School Program that provides "students from disadvantaged population groups under-represented in the Hawaii Bar with an opportunity to improve and to demonstrate their ability to do law school work. The students who are selected from among applicants with records not strong enough to justify admission into the regular program, must nonetheless show enough promise to indicate potential for successful completion of law study and significant contribution as lawyers." The only requirement to continue after the first year of work is a 2.00 grade point average with students earning a 1.6 to 1.99 grade point average admitted under probation. (See, Exhibit "A-2", attached.)

24. The report of the independent committee on admissions (See, Exhibit "E", attached.) noted that the School of Law places "strong emphasis on three special areas. First, whether the applicant has any particular skills which would qualify him to practice law in a specialty currently understaffed by the Bar. Thus, for ex-

ample, someone who spoke fluent Korean or was particularly knowledgeable about the law of the sea would stand a better chance for admission. Second, applicants who come from racial and ethnic groups currently under represented in the Bar are also given special consideration. Finally, the duration and quality of residency in the State of Hawaii is considered a positive feature. The majority of the applicants are residents of Hawaii." (See, Exhibit "E-13", attached.) The report further states that with regard to the Pre-Admissions Program the terms "economically and educationally disadvanged" as a practical matter translate into motivated applicants who are other than Caucasion, Chinese, Japanese and Koreans. Plaintiff alleges that "anything that departs from an unqualified and unlimited open policy implies some sort of ideology of preferences. And what one prefers, one tends to endow with merit." (Kraft, Ivor, *Race, Merit and the Fourteenth Amendment*) Such preferences are clearly unconstitutional, illegal under state and federal law and are prima facie evidence of the efficacy of the allegations of the plaintiff.

25. In modern history, Hawaii has no history of discrimination towards minorities such as the discrimination the blacks were subjected to in the southern United States that warrants any preferential admissions policies or extraordinary measures whatsoever, and in any event, "preferential arrangements for minority students cannot be established on a permanent basis." (The Director of the Office of Civil Rights In Re: *DeFunis v. Odegaard* record, 82 Wash. 2d 11; 507 P. 2d 1169 (1973), *vacated per curiam as moot*, 416 U.S. 312; 94 S. Ct. 1704 (1974), pp. 1201-1203 and Kraft, Ivor, *Race, Merit and the Four-*

teenth Amendment, p. 25.) Discrimination on racial grounds is always and invariably subject to the strictest scrutiny. (In Re: *Loving v. Virginia,* 388 U.S. 1 [1967]). "Judge Lloyd Shorett of the King County Superior Court, citing *Brown,* found that DeFunis had been deprived of equal protection of the laws under the Fourteenth Amendment, and ordered his admission to the Law School. 'In my opinion,' said Judge Shorett, 'the only safe rule is to treat all races alike and I feel that is what is required under the equal protection clause.' " (*DeFunis Record,* 116 and Kraft, Ivor, *Race, Merit and the Fourteenth Amendment.*) If educational corrections need to be made, the place to make them is at the secondary level, not at the graduate level. The only proper way to obtain an education is to *earn* it. Plaintiff has earned an opportunity for an education.

26. Plaintiff alleges that the defendants associated with the University of Hawaii and the State of Hawaii, individually and collectively, here designed and are supporting a system of "stonewalling" with regard to any information on any aspect of this dispute. In addition, the University of Hawaii, despite disclaimers to the contrary, has no timely, established system of review, and there is no practical way to scrutinize or to challenge the admissions process.

27. Plaintiff is currently representing himself in civil cases before the state and federal courts in Hawaii as his own attorney. Also involved in several of these civil cases is his wife and the plaintiff and his wife in their capacities as trustees for their son. On three separate occasions including one that is now before the U.S.

District Court in Civil No. 84-0784, opposing counsel have filed documents charging that the plaintiff in this case is engaged in the unauthorized practice of law under the Hawaii Revised Statutes Section 605-14. In a previous case and after instructions by the court, plaintiff was forced to retain counsel for his wife at an economic hardship to the family despite the fact that at the time, plaintiff desired to exercise his constitutional rights and to represent his family himself and his wife had agreed.

28. On two separate occasions, plaintiff has attempted to apply the examination for Admissions to the Bar. (See, Exhibit "O", attached.) On both occasions, plaintiff was informed that the Rules of the Supreme Court of the State of Hawaii (Rule 15) require that an applicant be a graduate of a law school approved by the Council of the American Bar Association on Legal Education and Admissions to the Bar in order to practice law in the State of Hawaii. While the rules are not specific, the practice at the Supreme Court is to deny a non-graduate the opportunity to take the examination. The current rules, practices, policies and usage of the Supreme Court of the State of Hawaii, when combined with the rules, practices, policy and common usage of the another branch of the State of Hawaii, the University of Hawaii, combine to deny plaintiff his constitutional rights to engage in the trade of his choice in violation of his First, Ninth and Fourteenth Amendments to the Constitution of the United States rights and in violation of applicable state and federal anti-trust, restraint of trade and anti-monopoly laws.

29. Defendants have established and are maintaining, under color of unconstitutional laws of the State of

Hawaii, a policy, custom, and usage of denying to qualified plaintiff applicant the equal protection of the laws by refusing him admission to the university School of Law on the basis of race and national origin through the device of protecting certain "slots" for those of specific race or national origin, and have continued the policy of refusing to admit qualified Caucasion, resident of Hawaii applicants into said School of Law, while at the same time admitting applicants on the basis or race or national origin with equal or less qualifications than plaintiff.

30. Defendants have established and are maintaining, under color of unconstitutional laws of the State of Hawaii, a policy, custom, and usage of denying to qualified Caucasion plaintiff applicant the equal protection of the laws and are engaging in acts of violation of the state and federal anti-trust laws, acts of restraint of trade, conspiracy and monopoly by refusing the plaintiff the educational opportunity to qualify for the employment of the practice of law in the State of Hawaii, while at the same time admitting applicants on the basis of age, race or national origin with equal or less qualifications than plaintiff. Applicants who are admitted and who graduate qualify to take the Bar examination. Plaintiff does not qualify under current, unconstitutional rules, to take the Bar examination.

31. The procedures of the Defendants as outlined in this complaint create a multi-layered, subtle, fine-mesh system of discrimination by which those applicants of a certain age who were born and raised in Hawaii, who graduated from secondary schools and who attended col-

lege in Hawaii and who are of a particular age, racial and/or national origin extraction, will pass through the filter where older Caucasion residents of the State of Hawaii who did not attend and graduate from secondary schools in Hawaii will not enjoy the same equal opportunity for admission to the School of Law and the practice of law in the State of Hawaii, tokenism and disclaimers not withstanding.

32. Defendants have established and are maintaining, under color of unconstitutional laws of the State of Hawaii, a policy, custom, and usage of a set of requirements for admission to the School of Law and for the practice of law in the State of Hawaii that are deliberately unconstitutionally vague so as to allow the maximum subjective evaluation of each application in flagrant violation of constitutional state and federal law, while at the same time admitting applicants on the basis of age, race or national origin with equal or less qualifications than those of the plaintiff.

33. The said action of defendants will effectively bar plaintiff from the lucrative practice of law now closed to him because of a lack of graduation from a law school approved by the Council of the American Bar Association on Legal Education and Admissions to the Bar, and will be obliged to accept less remunerative employment. "As the High Bench remarked in *Brown,* 'education is perhaps the most important function of state and local governments,' and debates over education sometimes go deeper than debates on race." (Kraft, Ivor, *Race, Merit and the Fourteenth Amendment.*)

34. The said action of defendants denies to plaintiff the right and privilege to obtain a law education in said law school; it places plaintiff at great disadvantage with regard to obtaining a law education within said state, as compared with other residents and non-residents of said state; it amounts to denial to plaintiff, a citizen of the United States and of the State of Hawaii, and others similarly situated of liberty and property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

35. Plaintiff is suffering irreparable injury and is threatened with irrepaable injury in the future by reason of the acts herein mentioned. Plaintiffs have no timely, practical, plain, adequate remedy to redress the wrongs and illegal acts herein complained of other than this suit for a declaration of rights and an injunction. Any other remedy to which plaintiff could be remitted would be attended by such uncertainties and delays as to deny substantial relief, would involve a multiplicity of suits, cause further irreparable injury, and occasion damage, vexation, and inconvenience, not only to plaintiff, but to defendants as governmental agencies.

Wherefore, plaintiffs respectfully pray that:

1. This court adjudge, decree, and declare the rights and legal relations of the parties to the subject matter here in controversy, in order that such declaration shall have the force and effect of a final judgment or decree.

2. That this court enter a judgment or decree declaring that the said admissions policy, custom, usage and practice of the defendants in denying plaintiff the

right to enroll, enter, and pursue courses of study at the School of Law at the University of Hawaii on account of his age, race or national origin is a denial of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States, and is therefore unconstitutional or is illegal under applicable state or federal law, as the admissions policy was applied specifically to the plaintiff.

3. That this court issue a permanent injunction forever restraining and enjoining defendants and each of them, from denying plaintiff the right to enroll and pursue courses of study at the School of Law at the University of Hawaii on account of his age, length of residence in the State of Hawaii, the location of the secondary schools or colleges he did or did not attend, his letters of reference or lack thereof, his community service or lack thereof, his race, national origin, any other unconstitutional or illegal subjective factors or any requirement not published in the information booklet of the Law School of the University of Hawaii that apply to persons of all races and national origin.

4. That in the alternative, that this court issue a permanent injunction prohibiting the University of Hawaii from using the current School of Law admissions procedure while finding the entire admissions process for the 1984-85 school year unconstitutional, illegal, null and void.

5. That this court then issue a writ of mandamus requiring the University of Hawaii to re-select applicants to the School of Law for the 1984-85 school year from a group of applicants who are legal residents of the State

of Hawaii who meet the four basic, above-named requirements listed in the School of Law information booklet, and requiring that the class for the 1984-85 school year be selected on the basis of the pick of the draw or by lottery from that group, and one of that group shall be the plaintiff.

6. That in the alternative, this court issue a writ of mandamus compelling defendants to register plaintiff as a first year student at this fall semester of the School of Law of the University of Hawaii.

7. That this court enter a judgment or decree declaring that the said Rule 15(b), policy, custom, usage and practice of the defendants Supreme Court of the State of Hawaii in requiring plaintiff to be a graduate of a law school approved by the Council of the American Bar Association on Legal Education and Admissions to the Bar in order to take the Bar examination or to be admitted to the practice of law in the State of Hawaii, is a denial of the equal protection of the laws as guaranteed by the First, Ninth and Fourteenth Amendments to the Constitution of the United States and is in violation of the federal and state anti-trust, monopoly and restraint of trade laws cited herein, and is therefore unconstitutional, illegal, null and void.

8. That this court issue a permanent injunction forever restraining and enjoining defendants and each of them, from denying plaintiff the right to take the Bar examination and if successful in passing the Bar examination, to be admitted to the practice of law in the State of Hawaii.

9. That this court enter a judgment or decree declaring that the said Hawaii Revised Statute Section 605-14, conspiracy, custom, usage and practice of the defendants Supreme Court of the State of Hawaii with regard to the "unauthorized practice of law", is a denial of the equal protection of the laws as guaranteed by the First, Ninth and Fourteenth Amendments to the Constitution of the United States and in violation of the federal and state anti-trust, monopoly and restraint of trade laws cited herein, and is therefore unconstitutional, illegal, null and void under the existing federal and state laws, abovenamed.

10. That this court issue a permanent injunction forever restraining and enjoining defendants and each of them, from denying plaintiff the right to represent with their consent, any member of his family before any federal or state court of law.

11. That this court enter a judgment in favor of the plaintiff against defendants for compensatory, special and nominal damages jointly and severally in an amount to be proven at trial, general damages of $50,000 and punitive damages of $1,000,000.

12. Plaintiff further prays that the court allow him his costs and compensation for his time in appearing as his own attorney, and such further, other, additional, or alternative relief as may appear to the court equitable and just.

DATED: Honolulu, Hawaii, October 4, 1984.

/s/ Robert W. Hall
ROBERT W. HALL, Pro Se

APPENDIX "C(2)"

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Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

ROBERT W. HALL, an individual,	) CIVIL NO. 84-1072
	) AFFIDAVIT OF WILLIAMSON CHANG EXHIBIT A
Plaintiff,	)
vs.	)
STATE OF HAWAII, et al.,	) Hearing: January 15, 1985, 9:30 a.m.) Judge: Honorable Samuel P. King
Defendant.	)

(Filed Dec. 14, 1984)

AFFIDAVIT OF WILLIAMSON CHANG

STATE OF HAWAII)
) ss:
CITY AND COUNTY OF HONOLULU)

WILLIAMSON CHANG, being first duly sworn on oath, deposes and says that:

1. He is a defendant in the above-entitled action and is employed as a professor at the Richardson School of Law ("Law School"), University of Hawaii at Manoa;

2. As part of his duties he is chairperson of the admissions committee at the Law School and has occupied that position at all times relevant to the pending motions; he has personal knowledge of the application for admission to the Law School submitted by plaintiff in this action, as well as of the other applications submitted for the 1984-1985 academic year; he also has personal knowledge of the purposes and selection criteria for the regular Law School Class and the Law School's "pre-admission" program;

3. The Law School received a total of 415 applications for places in the class beginning with the academic year 1984-1985 ("the Class");

4. There were a total of 80 places in the Class, and 120 acceptances were sent out to prospective students, with the expectation that approximately one-third would decline the acceptance;

5. Initial screening of applicants involved evaluation of three separate criteria: score on the Law School Admission Test (LSAT), undergraduate grade point average, and the applicant's personal profile; each applicant was rated from —2 to +5 in each area, and his or her point totals were added together to produce a single point score which was compared with those of other applicants;

6. Scores on the LSAT can range up to a high of 50 points; plaintiff's score of 25 on the LSAT placed him below the cut-off point for acceptable scores in this category, and he was given a score of —2 by the admissions committee; no successful applicants had an LSAT score as low as 25;

7. Plaintiff represented his undergraduate grade point average as between 3.82 and 3.90; although subse-

quent investigation indicated that this figure was for only a small portion of his undergraduate career and that consideration of earlier grades would have resulted in a significantly lower average, plaintiff was, on the basis of his representations, given a score of +5 in this category by the admissions committee;

8. Based upon what plaintiff submitted within the application deadline, plaintiff was given a score of +2 by the admissions committee in the category related to the plaintiff's personal profile, which included consideration of letters of recommendation, experience and other subjective factors;

9. Plaintiff's total score, derived from the addition of the three individual scores, was 5;

10. All of those offered admission to the Class had a combined score of at least 7; in addition, 34 applicants with scores of at least 7 were denied admission, and an additional 48 applicants with scores of 6 were also denied admission, as were 34 applicants with scores of 5;

11. At least 82 applicants with scores higher than plaintiff's were not accepted into the class;

12. Although the committee was not aware of it during its consideration of plaintiff's application, the pendency at the time of application of four counts of attempted murder against plaintiff, under circumstances indicating that plaintiff admitted shooting three persons, would have materially affected plaintiff's score related to his personal profile (See reported decision in *State of Hawaii v. Hall*, 66 Haw. 300, 660 P.2d 33 (1983), attached as Exhibit A);
the application instructions (attached to Plaintiff's Com-

plaint as Exhibit "A-4" - "A-5") clearly specified that, as to question 15, which sought generally relevant application information (See Plaintiff's exhibit "B-5"):

> In addition, you would be expected to disclose here any such information as the following:
>
> (a) Your dismissal, suspension or required withdrawal from any school, college or university;
>
> (b) Your conviction of a crime other than a minor traffic violation;
>
> The application instructions also stated that:
>
> To be considered by the Committee, your application must be signed and dated in the space provided following Question #15. Your signature constitutes a certification that the information you have given to the Law School is complete and truthful, and that no information *reasonably relevant* to your admission to the School has been purposefully withheld. (Emphasis supplied.);

13. As indicated in paragraph 7, above, plaintiff claimed that his undergraduate grade average was at least 3.82; subsequent examination of available records indicated that plaintiff received such a grade average only for approximately one year of study at Chaminade University; prior grades at other institutions were considerably lower and would result in a lower score by the admissions committee were they to reconsider plaintiff's application;

14. The Law School Pre-Admission program is a program designed to identify those persons who have experienced disadvantages in the community, whose test scores and grades do not accurately reflect their abilities, and who have displayed promise in other respects; race

and ethnicity are not determinative factors for consideration in the program, and all applicants to the class who are denied admission are considered as potential candidates for the pre-admission program; the primary criteria for inclusion in the program is economic disadvantage, and members of virtually every ethnic or racial group have been considered for admission and been admitted to the program;

15. Nothing in plaintiff's application suggested any sort of disadvantage, economic or otherwise, that would have qualified him for the pre-admission program;

16. Individuals selected for the pre-admission program are not admitted to the Class but are instead registered as unclassified graduate students; if these students complete a one year program of study with a satisfactory grade average, they may be admitted as law students in the next year's class and must then complete the three-year program;

17. The present pre-admission program has twelve students;

18. If the pre-admission program were eliminated, the size of each regular class would continue to be limited to eighty students;

19. The Law School has adopted a specific policy of not evaluating applications on the basis of the applicant's age;

20. As of September 10, 1984, the three regular classes had a total of eight caucasian students who were over the age of 40 at the time they were admitted to the Law School; of these three students were 48 years of age

at admission; in past years, the Law School has admitted students over 50 years of age;

21. Plaintiff was not denied admission to the Law School because of his race, ethnicity, place of birth, place of residence, or age; he was denied admission solely because—even construing his credentials in their best light—more than 200 applicants ranked higher in competition for the 80 seats in the class.

Further Affiant sayeth naught.

/s/ Williamson Chang
WILLIAMSON CHANG

Subscribed and sworn to before me on
this 13th day of December, 1984.

/s/ [Illegible]
Notary Public, State of Hawaii
My commission expires: 3/5/88

APPENDIX "C(3)"

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

CIVIL NO. 86-1646

[caption deleted in printing]

AFFIDAVIT OF JEREMY T. HARRISON

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

JEREMY T. HARRISON, being duly sworn upon oath, hereby deposes and says:

¶ 1. I am a resident of the State of Hawaii, and a defendant in this action. I am currently Dean of the William S. Richardson School of Law at the University of Hawaii ["Law School"]. I have held this position since October 1985. From about January 1985 to my appointment as Dean, I was Acting Dean of the Law School. From August 1984 to my appointment as Acting Dean, I was Associate Dean of the Law School. I also was Associate Dean during the period from 1977 through 1979. The statements herein are based upon my personal knowledge.

¶ 2. I am familiar with, and have oversight responsibility over, the Law School admissions process, and I have custodial control over the records and documents that are compiled during that process, as well as other documents maintained in the Dean's Office. I have reviewed the files of Robert W. Hall, plaintiff herein, with respect to Mr. Hall's applications for admission to the Law School classes commencing in August 1984, 1985 and 1986 [hereinafter

"admission years 1984, 1985, and 1986"]. I have also reviewed admission files of other applicants during these admission years and discussed the qualifications of other applicants with members of the Admission Committees from these years.

¶ 3. Robert W. Hall has been denied admission to the Law School for admission years 1984, 1985, and 1986 for reasons unrelated to Mr. Hall's race, age, sex, national origin, place of residence, ancestry, political affiliation, or other improper factor. I base this statement on the following.

¶ 4. Each year many more qualified persons apply to the Law School than can be admitted. Because of the persistent oversupply of qualified applicants, admission decisions inherently involve the evaluation of numerous policy choices, including the best use of scarce educational resources, the needs of the State, or particular areas, or constituencies, for legal services, and the weight to be assigned to an applicant's experience or personal statements. In admission years 1984-1986, the Law School was required to make these policy judgments in the face of 400 to 450 applications per year for about 80 seats in the entering class. Exercising its discretion, the Law School each year selected about 100 to 130 applicants, to whom acceptance letters were sent.

¶ 5. In addition, the Law School each admission year selected about 12 applicants for the Law School Pre-Admission Program, which is designed to identify those persons who, for reasons beyond their control, have experienced disadvantages in the community, whose test scores and grades do not accurately reflect their abilities, and

who have displayed promise in other respects. Like the regular admission process, the selection of candidates for the Pre-Admission Program inherently requires and did in fact involve the weighing of a broad variety of public policy factors.

¶ 6. For admission years 1984-86, the admission process for both the regular class and the Pre-Admission Program involved five discrete stages.

(a) In the first stage, applications were preliminarily reviewed to determine whether applicable fees had been paid, undergraduate transcripts were complete, statements of residence were appropriately supported, and the applications otherwise were complete. In addition, applicants were reviewed and assigned points on a scale from —2 to +5 for undergraduate grade point average ["GPA"]. At this stage applicants were also assigned points on a scale from —2 to +5 for scores on the Law School Admission Test ["LSAT"]. This assignment was purely objective and made from a grid approved before the admission process began in 1984. The same grid was in use in admission years 1984-86.

(b) In the second stage, applications were reviewed by the Admissions Committee, which consisted of two faculty members, one administrator, and three students. For applicants within range of acceptance at the end of the first stage, the Admissions Committee assigned points on a scale from —2 to +5 on the basis of an evaluation of the applicant's personal profile, which included consideration of letters of recommendation, experiences, and other subjective factors. On the basis of this evalua-

tion, the Admission Committee made recommendations for admission.

(c) In the third stage, applications surviving the first two stages would be rechecked to determine completeness and proper assignment of scores from the GPA/LSAT grid. If a recheck of these scores diminished the applicant's GPA or LSAT rankings, the application would be returned to the Admission Committee. If the application was found in fact to be incomplete, the Law School would in the normal course reject the applicant at that time.

(d) At the fourth stage, applications surviving the first three stages were reviewed by the faculty at a scheduled faculty meeting. If the faculty determined that the personal profile score had been improperly assigned, the faculty, by majority vote, had the right to reject the applicant or place the application on "hold" pending further recommendations of the Admission Committee.

(e) At the fifth stage, the Dean had the opportunity finally to review the list of applicants recommended for admission. If, in the opinion of the Dean, there was substantial evidence indicating the applicant was manifestly unqualified according to the published criteria of the Law School, the Dean had the prerogative to reject the applicant notwithstanding the failure of the faculty to veto the recommendation of the Admission Committee.

¶ 7. In admission years 1984-86, Mr. Hall's application did not advance beyond the second stage of review. Mr. Hall was referred to the Admission Committee because it was believed his application possibly fell within the range of acceptance. However, according to the GPA/

LSAT grid, Mr. Hall was entitled to a total of only zero points based on objective factors because his LSAT was 25 and his GPA, properly calculated, was below 3.1. Even if Mr. Hall had been awarded the maximum number of points on his personal profile (5), his total score would have been below that of the lowest-ranking applicant admitted to the class. In addition, the Admission Committee found in each of the admission years that Mr. Hall had not demonstrated the sort of disadvantage that would have qualified him for the Pre-Admission Program.

¶ 8. Other white male resident applicants over age 35 were admitted to the regular class. The following statistics compiled by my office show, to the best of our knowledge, the effect of the regular admission process on white male resident applicants over thirty-five years of age:

Year	Percentage of White Male Resident Applicants Oaer 35 Offered Admission	Percentage of All Applicants Offered Admission
1984	27.2 %	28.6 %
1985	50.00%	32.3 %
1986	28.60%	25.2 %
1984-86	35.89%	28.75%

¶ 9. In each of the three years that Mr. Hall has applied, applicants were informed by means of written instructions that the Law School "accords significant weight to each applicant's undergraduate scholastic record" and pays "special attention" to indicia of "maturity, and sense of responsibility [,]" as well as of "commitment; contributions to the public welfare; and leadership [.]" The application instructions inform the applicant that "Your signature constitutes a certification that the information

you have given to the Law School is complete and truthful, and that no information reasonably relevant to your admission to the School has been purposefully withheld." The applications also state that the deadline for completing applications is March 1 of the relevant admission year. A true copy of the Instructions to Application Form and Application used in admission year 1986 is attached to this affidavit as Exhibit 1. With the exception of changes to the date, the language of these forms was substantially identical in admission years 1984 and 1985.

¶ 10. In his 1984 application, received by the Law School prior to the March 1, 1984, deadline, Mr. Hall represented his GPA as 3.82 out of a possible 4 points. In a letter dated May 4, 1984, which was received prior to his rejection, Mr. Hall represented his grade point average as 3.90 of a possible 4 points. True copies of Mr. Hall's 1984 application and the May 4, 1984 letter are attached to this affidavit as Exhibit 2.

¶ 11. According to material supplied to the Law School by the Law School Data Assembly Service ["LSDAS"] on February 10, 1984, Mr. Hall's GPA was significantly below either 3.82 or 3.90. Nor did the GPA Mr. Hall claimed on his application reflect grades received at institutions other than Chaminade University. Although LSDAS calculated that Mr. Hall's GPA based on work at Chaminade, the University of Hawaii, and Armstrong College of Savannah would be 3.81, LSDAS did not include within this calculation a very significant record Mr. Hall compiled at State Teachers College in Towson, Maryland ["State Teachers College"] from 1951-54.

¶ 12. According to the information provided by LSDAS, a true copy of which is attached as Exhibit 3, Mr. Hall received four B's, 11 C's, and four D's while at State Teachers College. These grades were below Mr. Hall's claimed GPA, and if given the standard weights assigned to such grades (0 for "F"; 1 for "D"; 2 for "C"; 3 for "B"; and 4 for "A"), weighted further to reflect the credit hours of study evaluated (so that, for example, a grade in a four-hour course would be weighted twice as heavily as that in a two-hour course), and averaged with his other grades, Mr. Hall's college scholastic record would have shown a GPA of not more than approximately 2.78.* In admission year 1985, the Law School received Mr. Hall's final semester grades from Chaminade University. With these grades, Mr. Hall's GPA for purposes of admission years 1985 and 1986 was from about 2.8 to about 3.0.

¶ 13. Given the significant gap between Mr. Hall's represented GPA and his actual GPA, it is my professional judgment that there was substantial evidence in the record as early as 1984 that Mr. Hall purposely attempted to mislead the Law School in his 1984 application.

¶ 14. I am further aware, and was aware in early 1985, that during litigation in the United States District

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* This calculation is based upon giving Mr. Hall the benefit of the doubt as to whether a quarter credit hour at State Teachers College is equivalent to a quarter credit hour at Armstrong College (which LSDAS appears to evaluate as the equivalent to a modern trimester hour), or to half of a semester credit hour. Treating the State Teachers College quarter credit hour as a trimester credit hour yields the 2.78 GPA. Using the latter method yields a GPA of about 2.66.

Court for the District of Hawaii, *Hall v. Hawaii*, No. 84-1072 (D. Hawaii 1984) [*"Hall I"*], Mr. Hall notified that his 1984 application statements were misleading. This notice was supplied by the affidavit of Professor Williamson Chang, served December 14, 1984, a true copy of which is attached hereto as Exhibit 4. In his affidavit, Professor Chang states Mr. Hall's "representations" of a 3.81 or 3.90 GPA were not correct and the Law School would take into account "prior grades at other institutions" if his application were "reconsider[ed.]" Professor Chang's statements were correct at the time and continue to be correct as a matter of Law School policy. Regardless of what may be done at other divisions of the University, the Law School throughout my tenure has considered and will continue to consider all undergraduate grades in degree-conferring programs available to us in acting upon admission applications. (The Law School during the period in question did not consider grades in graduate degree programs in computing GPA, although they were subject to consideration in the personal profile portion of the evaluation.)

¶ 15. Following his rejection in 1985, Mr. Hall attempted to override the Law School admissions process by representing to the President of the University that his undergraduate GPA was 3.8 or higher. A true copy of a letter dated September 3, 1985, from Mr. Hall to President Simone, a copy of which was sent to the Law School, is attached hereto as Exhibit 5. As noted above, at the time he wrote this letter and thereafter, Mr. Hall's GPA was from about 2.8 to 3.0. Even with Mr. Hall's final grades from Chaminade University, which were not

subject to consideration in admissions year 1984, Mr. Hall's GPA at the time (and during admission years 1985 and 1986), taking into account his full undergraduate record, was from about 2.8 to 3.0. While, Mr. Hall did not represent to the Law School in his 1985 and 1986 application statements that his GPA is 3.80 or higher, he did not explain his representations in 1984, or those to President Simone in 1985. True copies of Mr. Hall's application materials for 1985 and 1986 are attached as Exhibit 6.

¶ 16. The facts stated in the foregoing paragraph constitute, in my judgment, additional substantial evidence of an attempt by Mr. Hall to mislead the Law School in 1984 as well as a general pattern on Mr. Hall's part of attempting to mislead others about his undergraduate record.

¶ 17. In addition to the foregoing, beginning no later than the date of my appointment as Acting Dean, I have in good faith believed that, as a result of an incident on about May 16, 1980, Mr. Hall was indicted on four counts of attempted murder and related charges of carrying a firearm without a permit. I was further aware and continue to believe in good faith that during the course of his criminal proceedings, Mr. Hall admitted he in fact did shoot three people and, further, that Mr. Hall's principal defense was that at the time of the shooting he was so lacking in capacity that he could not appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law.

¶ 18. My foregoing belief as to Mr. Hall's admissions derives from (a) the published opinion in *State v. Hall.*

66 Hawaii 300, 660 P.2d 33 (1983), which was attached to Professor Chang's affidavit in *Hall I;* (b) my understanding that the Supreme Court of Hawaii will generally not recite facts in a criminal case on interlocutory appeal unless there is no dispute as to their truth, and (c) the following passage from *State v. Hall*:

> On May 16, 1980 at the Waikiki Yacht Club, appellant [Hall] fired a gun wildly into a crowd of people, hitting three people below the waist and narrowly missing a fourth.

66 Hawaii at 301. My foregoing belief as to Mr. Hall's defense derives from the following recitation of Mr. Hall's position:

> Appellant argues, on the contrary, that his alleged extreme physical susceptibility to the alcohol or other components in the wine which he had voluntarily ingested prior to the incident in question, could be the basis of a physical or mental disease, disorder, or defect, excluding penal responsibility.

66 Hawaii at 303. It is, was and remains my understanding that Mr. Hall was acquitted of the charges in about June 1984. On the basis of Mr. Hall's admissions and defense strategy, it was and is my good-faith belief that Mr. Hall was acquitted because he prevailed upon his lack-of-capacity theory, and hence there is substantial reason to believe that in a variety of settings, Mr. Hall may spontaneously resort to violence.

¶ 19. Mr. Hall's conduct on about May 16, 1980 is manifestly relevant to the criteria for admission stated on the instructions to applicants, including whether the applicant has demonstrated a "sense of responsibility," quali-

ties that "might predict a strong sense of professional responsibility in the future," or ability to contribute to "the delivery of legal services in the State of Hawaii." Mr. Hall has not ever specifically mentioned or explained the 1980 incident in his 1984 application, his 1985 application, or his 1986 application.

¶ 20. In my professional judgment, Mr. Hall's failure to address the 1980 incident at the Waikiki Yacht Club constitutes substantial evidence of an attempt to withhold reasonably relevant information, contrary to the instructions to applicants, and is a basis for rejecting Mr. Hall's applications in each of application years 1984, 1985, and 1986.

¶ 21. Because of Mr. Hall's failure to explain the 1980 incident, the record presented to the Law School at the respective March 1 deadlines in admissions years 1984-86 lacked evidence that would clearly convince me Mr. Hall would not again resort to such conduct as was reported in *State v. Hall*. As chief administrator of the Law School, with an obligation to provide for the safety and well-being of students, staff, and visitors to the Law School, it is, accordingly, my good-faith belief that Mr. Hall, on the state of the record in admissions years 1984-86, cannot be permitted to enroll as a member of the regular class or the pre-admission program.

¶ 22. Because of the evidence indicating Mr. Hall attempted to mislead the Law School and others concerning his GPA and the 1980 incident, and the potential risk to the Law School community that would be presented by Mr. Hall's admission as a student, Mr. Hall's application

was not similarly situated to that of any other applicant in application years 1984, 1985, and 1986 who was admitted to either the regular class or the special admissions program.

¶ 23. Furthermore, for the foregoing reasons, if, during my tenure as Acting Dean or Dean, Mr. Hall had been recommended by the Admissions Committee or the Faculty for admission to the regular class or special admission program of 1984, 1985, or 1986, I would have used my authority as Dean and reversed that decision.

Further affiant sayeth naught.

/s/ Jeremy T. Harrison
Jeremy T. Harrison

Subscribed and sworn to
before me this 27th day
of June, 1986.

/s/ Helen N. Shikina
Notary Public, State of Hawaii
My Commission Expires: 1-30-89

APPENDIX D

NO. 12636

IN THE SUPREME COURT
OF THE STATE OF HAWAII

STATE OF HAWAII,

Plaintiff-Appellee,

vs.

ROBERT W. HALL,

Defendant-Appellant.

CR. NO. 54332

APPEAL FROM THE ORDER DENYING
MOTION TO SEAL THE RECORD,
ATTACHED HERETO AS EXHIBIT "A,"
FILED NOVEMBER 6, 1987

FIRST CIRCUIT COURT

HON. ROBERT WON BAE CHANG, RICHARD Y.C. AU, PHILIP T. CHUN, and PATRICK K.S.L. YIM, JUDGES

(Filed August 18, 1988)

MEMORANDUM OPINION

Robert W. Hall, defendant-appellant, filed a motion in the Circuit Court for the First Circuit, seeking to seal the court record in a criminal proceeding where he was acquitted of four counts of attempted murder and one count of carrying a firearm without a permit. The circuit court denied the motion and he appeals to this court.

Though we have given the appellant's argument due consideration, we find no constitutional or statutory basis for sealing the record.

Affirmed.

DATED: Honolulu, Hawaii, August 18, 1988.

Robert W. Hall,
appellant, pro se

Steven S. Michaels,
Deputy Attorney General,
for appellee

/s/ H. Lum

/s/ Edward Nakamura

/s/ Frank D. Padgett

/s/ Yoshimi Hayashi

/s/ James S. Burns

APPENDIX E

NO. 12636

IN THE SUPREME COURT
OF THE STATE OF HAWAII

STATE OF HAWAII,

Plaintiff-Appellee,

vs.

ROBERT W. HALL,

Defendant-Appellant.

CR. NO. 54332

APPEAL FROM THE ORDER
DENYING MOTION TO SEAL
THE RECORD, ATTACHED HERETO
AS EXHIBIT "A", FILED
NOVEMBER 6, 1987

FIRST CIRCUIT COURT

HONORABLE ROBERT WON BAE CHANG, HONORABLE RICHARD Y.C. AU, HONORABLE PHILIP T. CHUN, HONORABLE PATRICK YIM, Judges.

BRIEF OF APPELLANT

CERTIFICATE OF SERVICE

(Filed Feb. 22, 1988)

WARREN PRICE, III (1212)
Attorney General
State of Hawaii

STEVEN S. MICHAELS (3852)
Deputy Attorney General
State of Hawaii
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Defendant-Appellant Pro Se

BRIEF OF APPELLANT

I.

STATEMENT OF JURISDICTION

1. Jurisdiction is found on the grounds of Article VI, Section 1 of the State Constitution. The statutory grounds for jurisdiction are found in the Hawaii Revised Statutes, sub-chapter 602-5 and Chapter 641.

2. The order appealed from, the Order Denying Motion to Seal the Record filed November 6, 1987 has the effect of a final judgment (Appendix "A").

3. The Notice of Appeal was filed on Monday, December 7, 1987, within thirty days of the entry of the Order appealed from on November 6, 1987 (H.R.A.P., Rule 26[a]).

4. The defendant was acquitted on an oral motion of all allegations of four counts of attempted murder and a firearms charge and the order was entered on June 18, 1984 (Appendix "B"). Hall's arrest record was expunged pursuant to H.R.S. Section 831-3.2 (Appendix "C").

II.

STATEMENT OF THE CASE

This appeal involves constitutional and statutory questions concerning the former defendant-appellant

Hall's motion to seal the court record with regard to a trial where the former defendant-appellant has previously been acquitted of all criminal charges more than three years prior to the motion to seal. The questions involve the applicability of state constitutional and statutory rights to privacy in relation to Hall's motion to seal the record and where the state's compelling interests lie.

The lower court did not hold a hearing. The November 6, 1987 Order Denying Motion to Seal the Record (Appendix "A") was filed without findings of fact or conclusions of law.

III.

POINTS ON WHICH THE DEFENDANT-APPELLANT INTENDS TO RELY

The court below erred or abused its discretion in denying the request to seal the record. The court below erred and abused its discretion in denying the former defendant-appellant the right to file a motion for an order to strike or in the alternative an objection (CR Vol. 5, 1-26, Exhibit "A").

IV.

STANDARD OF REVIEW

Review is requested for error or abuse of discretion. De novo review is also requested.

V.

STATEMENT OF QUESTIONS FOR DECISION

A. Is the November 6, 1987 decision of the Circuit Court clearly erronous?

B. Did the lower court abuse its discretion when it entered the above-named decision?

C. Is the decision on appeal unconstitutional or in violation of the privacy provisions of the state and federal constitutions and/or state or federal law with regard to the appellant's privacy rights?

D. Is the decision on appeal subject to H.R.S., Chapter 92 and the individual privacy exclusion found in the definition of H.R.S., Chapter sub-part 92-50?

E. Does Chapter sub-part 92-6 the judiciary exclusion apply to any part of Chapter 92 other than Part I?

F. Does the lower court err or abuse its discretion when it refused to allow the former defendant-appellant to file a motion for an order to strike or in the alternative an objection?

G. In the alternative, when is an acquitted defendant's constitutional right of privacy restored to him?

VI.

ARGUMENT

A. THE LEGISLATURE HAS FAILED TO ENACT ANY EXCEPTION TO HALL'S CONSTITUTIONAL RIGHT TO PRIVACY.

The court below erred or abused its discretion in not recognizing that all the state's sour-grape arguments are moot in the absence of legislative action that would tend to erode the Hall's state constitutional right to privacy. The language of the state constitutional right states that the right of privacy "shall not be infringed without the showing of a compelling state interest".

Not only has the legislature not eroded Hall's right, the legislature has strengthened that right. The legislature has held that the records the former defendant-appellant seeks to seal are those which invade the right of privacy pursuant to H.R.S., Chapter 92 and the individual privacy definition exclusion of sub-part 92-50. The exclusion of the judiciary applies only to Part I, Meetings, and not to any of the remaining four parts of Chapter 92. Chapter 92E does not apply the judiciary but there is no such exclusion with regard to Parts II through V of Chapter 92. The legislature specifically excluded records that invade the privacy of an individual and the judiciary was not excepted. There is no record more personal that the unsubstantiated allegations of a criminal trial where the defendant was acquitted of all allegations and charges. If the publication of that record does not invade the privacy of an individual, no other record ever will.

The records in question were received for filing and were assigned a file number. The records include privileged medical and psychological examinations among many other highly confidential records. The House Standing Committee Report No. 594 included examinations among the documents to be held confidential. (See, *Painting Industry of Hawaii Market Recovery Fund v. Alm,* No. 12094, December 3, 1987.) The report suggested only samples of documents to be held confidential along with "other similar records" without narrowing the list in any way.

H.R.S. 92-6, the exception for the judiciary states, "(a) *This part* shall not apply: (1) To the judicial branch." "This part" is Part I. Public records are

covered as Part V. The exception does not apply to Part V. No one has the right to request any of these records. The judicial branch had no right to release Hall's files to the Attorney General or anyone else. The court below erred and abused its discretion by not enforcing Chapter 92, Part V. The only practical way of enforcing Chapter 92, Part V is to seal the record.

B. THERE IS NO COMPELLING STATE INTEREST IN HOUNDING AN ACQUITTED DEFENDANT TO HIS GRAVE.

With regard to the constitutional issue, the only legitimate interest of the state is that of restoring the privacy, the practical and legal civil rights of all acquitted defendants at the earliest possible date. Criminal defendants are held up to public scrutiny against their will, they are forced to sit in a courtroom while still photographers and television camera crews take their pictures at will, and they suffer from the heavy editing and editorial bias of those who write and report on the trial. The more sensational the charges, the heavier the press coverage. The earlier the acquittal, the more difficult it is for the acquitted defendant to resume his/her place in society for the simple reason that the earlier unproven allegations remain in the record while balancing information has not yet been introduced.

In the alternative and without prejudice to any of the rights of the statutory rights of the former defendant-appellant, there is no compelling state interest in denying a citizen his/her state constitutional privacy rights within a reasonable time after trial. More than one year after

trial is well beyond any reasonable state interest. There is absolutely no state interest at 3½ to 4 years after acquittal.

The court below erred or abused its discretion when it failed to protect Hall's statutory or state constitutional right to privacy. In the alternative, the court below failed to weigh and determine the competing interests and find in favor of Hall. American government is unique in that the rights of minorities are protected.

Hall's interests outweigh those of the public upon consideration of the relevant facts and circumstances of this particular case. The integrity of the judicial process is not at stake in this appeal. Hall has clearly been harmed by the use of the records in question by the office of the Attorney General in Civil No. 84-1072 in the United States District Court for the District of Hawaii, before the Ninth Circuit Court of Appeals in No. 85-1698, in Civil No. 86-1646 in Circuit Court of the First Circuit of the State of Hawaii, No. 11992.

Deputies from the Office of the Attorney General have made it crystal clear that they will continue to ignore the constitutional and statutory right of privacy of the plaintiff and that they will use the records from this case against Hall at any opportunity for the rest of his life. After a favorable decision on appeal or on remand, Hall intends to move to seal all the remaining files.

The restoration and resumption of a defendant's personal and business life is difficult after a criminal trial even without the Attorney General's unlawful and unconstitutional misuse of personal files. That effort is extra-

ordinarily difficult under the current circumstances. The appellees' Memorandum in Opposition to Motion to Seal the Record filed in connection with the motion to seal on October 26, 1987 is a perfect example of the Attorney General's unlawful techniques. If a personal document is in a case file anywhere, that document is fair game for the Attorney General. No discretion is used. Nothing is held back.

All legitimate judicial interest in the matter must end with the acquittal. The state must not appear to be arbitrary or capricious with regard to the protection of privacy rights or with regard to any other constitutional right.

C. CONSTITUTIONAL CONVENTION INTENT.

The Hawaii Constitution must be construed with due regard to the intent of the framers and the people adopting it. The fundamental principle in interpreting a constitutional provision is to give effect to that intent. (*State v. Kam*, No. 11861 and *State v. Cohen*, No. 11949, January 8, 1988, 10 citing *State v. Lester*, 64 Haw. 659, 649 P.2d 968 [1982]; *Huihui v. Shimoda*, 64 Haw. 527, 644 P.2d 968 [1982]; *State v. Kahlbaun*, 64 Haw. 197, 638 P.2d 309 [1981]; *State v. Miyasaki*, 62 Haw. 269, 614 P.2d 915 [1980]).

The Standing Committee of the 1978 Hawaii Constitutional Convention recommended approval of the state constitution privacy amendment because "it would be useful in prohibiting abuse, misuse or unwarranted revelations of highly personal information . . . in a day when outside forces seek to learn more and more about an in-

dividual and control more and more about an individual's life, this amendment is necessary". *Proceedings of the Constitutional Convention of Hawaii of 1978*, p. 675.

The Constitutional Convention Committee on Bill of rights, Sufferage, and Elections explicitly stated that the right of privacy shall cover the areas of tort privacy, informational privacy, and the right to personal autonomy (Proceedings, *supra* note 89, Bill of Rights, Sufferage, and Elections Standing Committee Report No. 69 at 7-8). Of particular significance to the instant appeal is the following statement by the Committee:

> Your committee believes that the right of privacy encompasses the common law right of privacy or tort privacy. This is a recognition that the dissemination of private and personal matters, be it true, embarrassing or not, can cause mental pain and distress far greater than bodily injury. For example, the right can be used to protect an individual from invasion of his private affairs, public disclosure of embarrassing facts, and publicity placing the individual in a false light. In short, this right of privacy includes the right on [sic] an individual to tell the world to "mind your own business." (*Id.*, at 7).

In *Kam-Cohen*, the Hawaii Supreme Court wrote:

> The privacy provision was drafted by the 1978 and incorporated into the Hawaii Constitutional Convention and incorporated into the Hawaii Constitution by the general election of that year. The Convention's Committee on Bill of Rights, Suffrage and Elections recommended passage of the proposed article I, section 6 by stating that:
>
> "Perhaps the most important aspect of privacy is that it confers upon people the most important right of all—the right to be left alone. As Justice Brandeis said in his now celebrated and vindicated dissent in *Olmstead v. U.S.*, 277 U.S. 438 (1928):

'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.'

It gives each and every individual the right to control certain highly personal and intimate affairs of his own life. The right to personal autonomy, to dictate his lifestyle, to be oneself are included in this concept of privacy.

. . . .

It should be emphasized that this right is not an absolute one but, because similar to the right of free speech, it is so important in value to society that it can be infringed upon only by the showing of a compelling state interest. If the State is able to show a compelling state interest, the right of the group will prevail over privacy rights of the right of the individual. However, in view of the important nature of this right, *the State must use the least restrictive means should it desire to interfere with the right.*

Stand. Comm. Rep. No. 69, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978, at 674-75 (1980) (emphasis added)."

After extensive debates, the Convention's Committee of the Whole adopted the proposal and concluded that: this privacy concept encompasses the notion that in certain highly personal and intimate matters, the individual should be afforded freedom of choice absent a compelling state interest. This right is similar to the privacy right discussed in cases such as *Griswald v. Connecticut*, 381 U.S. 479 (1965). *Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Roe v. Wade*, 410 U.S. 113

(1973), etc. It is a right that, though unstated in the penumbra of several guarantees of the Bill of Rights. Because of this, there has been some confusion as to the source of the right and the importance of it. As such, it is treated as a fundamental right subject to interference only when a compelling state interest is demonstrated. By inserting clear and specific language regarding this right into the Constitution, your Committee intends to alleviate any possible confusion over the source of the right and the existence of it.

Committee of the Whole Rep. No. 15, *supra*, at 1024 (emphasis added). . . . Based on the clear and unambiguous reports, "a compelling state interest" must exist before the government may intrude into those "certain highly personal and intimate affairs of [a person's life]."

There are few more highly personal and intimate records than a criminal trial record where the charges and allegations were never proven and the defendant was acquitted of all charges.

D. OTHER CONSTITUTIONAL PROTECTIONS

Article I, Section 6 of the state constitution is not the only applicable constitutional protection. The former defendant-appellant is also protected by Article I, Section 8, "No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land" (emphasis added) and Article I, Section 22, "The enumeration of rights and privileges shall not be construed to impair or deny others retained by the people." The state has a clear obligation to restore the Hall's privacy and to put a halt to the Attorney General's attempt to deny Hall his rightful place in society under these constitutional provisions in addition to the privacy provision.

E. APPLICATION OF THE HAWAII CONSTITUTION TO THIS CASE

It is obvious that a person cannot enjoy his constitutional right of privacy and right to be left alone if the Attorney General persists in smearing him with records that are false, hearsay or taken out of context. Any application of public rights involving a trial ending with a complete acquittal must end at the end of the trial. There is also a legitimate question as to whether the public ever had any rights pursuant to Chapter 92, Part V.

The continued use of material supporting allegations that were never proven has a detrimental impact on the former defendant-appellant's constitutional rights. The state must demonstrate a compelling governmental interest in order to take away and in the alternative, refuse to restore the former defendant-appellants privacy rights. State has not met its burden.

Except for the unfounded and acquitted criminal charges, the former defendant-appellant would not have voluntarily produced any privileged information contained in the file. In any other setting, the information produced by the prosecution would have been subject to defamation action. Either way, the information stands as hearsay produced under the compulsion of criminal allegations that were never proven.

The court below erred and abused its discretion in not recognizing that the request to seal the file was no longer subject to broad judicial discretion. The request was actually a demand for the protection and enforcement of statutory and constitutional rights where the court below had no discretion except to protect those rights.

F. THE STATE HAS IGNORED THE APPELLANT'S RIGHTS

It is the state that is using the information the former defendant-appellant seeks to seal. The court below erred or abused its discretion in not recognizing that the information in question is unsubstantiated hearsay.

The trial and acquittal were unique in that acquittal was entered prior to the last prosecution witness having completed his testimony. As a result, neither the former defendant or any of his witnesses ever testified at the trial. Acquittal was entered before the former defendant-appellant had an opportunity to defend himself with regard to the false information presented by the prosecution. The Attorney General's office has presented this file false, heresay, out of context information accompanied by affidavits in two civil cases subsequent to the criminal trial. Had the affiants been subject to cross-examination, they would have been thoroughly discredited. The result has been summary judgment primarily as a result of the shock value of the raw information. The Attorney General has gotten away with the tactic to date.

The former defendant-plaintiff has never had any opportunity to refute any of the information. The lower court refuted the information by the entry of an order of acquittal. The acquittal is meaningless as long as the Attorney General or the Deputy Honolulu Prosecuting Attorney desire to continue to be vindictive. The only defense the former defendant-appellant has is to deny them access to the file. As long as either has access to this hearsay information, the practical effect is to shock courts into an immediate dismissal or summary judgment against Hall no matter what issue is before a court, and

his protests fall on deaf ears. Courts never hear the word "acquittal". Courts simply assume that if the Attorney General is placing the information before a court, the information must have successfully survived cross-examination and was found to be fact. The Attorney General has been successful in influencing the court's mind long before any practical means is available to argue the point. The problem is the classic case of asking a person when he stopped beating his wife. All related civil actions were settled out of court without any admissions by any party. No relief was available to the appellant through those civil cases.

G. THE INFORMATION IS POTENTIALLY LIBELOUS

The court below erred or abused its discretion in failing to consider that the raw files contain uncorroborated, false and potentially libelous accusations that affect both the personal and the business reputation of the former defendant-appellant. The information the former defendant-appellant seeks to have sealed had a purpose earlier in this case. Much of the information involves personal medical records, the opinions of medical and health care professionals that may or may not be biased or valid, and other highly personal information. Once that purpose terminated with acquittal, there is no other lawful purpose for not keeping this information confidential. If this information were part of a state employee's personnel record, the information would not be made available to the public. The former defendant-appellant retains those same rights.

H COMMON LAW RIGHTS ARE NOT ABSOLUTE

The traditional common law right to inspect and copy judicial records and documents is superseded by the appellant's constitutional, statutory rights. Common law is not absolute. In common law, the trial court has supervisory power over its own records and files. The court has the broad discretion to seal the records while the trial is proceeding if the public's right of access is outweighed by competing interests. (See, *Honolulu Advertiser, Inc. v. Takao,* 59 Haw. 237 [1978]; *Nixon v. Warner Communications, Inc.,* 435 U.S. 589, 598 [1978]; *United States v. Hickey,* 767 F.2d 705, 708 [10th Cir. 1985]; *In re Knight Publishing Company,* 743 F.2d 231, 238 [4th Cir. 1984]; *In re National Broadcasting Company, Inc.,* 653 F.2d 609, 612 [D.C. Cir. 1981]).

Assuming in the alternative that the appellant had no constitutional or statutory rights, the appellant still would prevail in common law. While the decision to seal is normally left to the trial court when the trial is in progress, the instant trial has long since been over. At *Nixon,* at 599, the Supreme Court suggested factors to be weighed in a balancing test when a request to seal is made while a case is in progress. One of those factors is whether the records are sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage. The use of the records is question by the Office of the Attorney General of the State of Hawaii in order to keep Hall out of the Richardson School of Law at the University falls squarely within the balancing test for a case in progress, much less a case that has been over for years. There is no legitimate public purpose in continuing to unfairly disadvantage Hall or in promoting public

scandal. The court below erred or abused its discretion in failing to protect Hall.

I. JUDICIAL NOTICE

The citations, facts, affidavits, exhibits, references and allegations of the pleadings filed in this case and in Civil No. 86-1646, No. 11992, are adopted herein and made a part hereof for all purposes. The appellant requests that the court take judicial notice of the documents chosen by the Attorney General and how the Attorney General used the files from this case in Civil No. 86-1646.

J. PRO SE LITIGANT NOTICE

Should there be any error in this pleading, the appeals court is requested to note that the former defendant-appellant appellant is pro se. The U.S. Supreme Court has repeatedly held that pleading is no longer a game of procedural skill at which counsel must be adept in order to insure a decision of his case on the merits. The U.S. Supreme Court has found that pleadings drawn by laymen appearing pro se, must be sympathetically scrutinized to determine whether some claim has been set forth. (See, *Dioguardi v. Durning,* [CCA2d, 1944] 139 F.2d 774, 7 FR Serv. 8a.25, Case 7.)

Such pleadings are held to less stringent standards than formal pleadings drafted by lawyers. (See, Moore's Federal Practice, Second Edition, Vol.2A, 1984, Section 8.13, pp. 8-121-122.) Any attempt to place form over substance runs counter to this concept.

K. OBJECTION

The statement made by the plaintiff-appellee on p. 1 of its October 26, 1987 Memorandum in Opposition to Mo-

tion to Seal the Record as to the reason for acquittal is a deliberate lie. The case was dismissed solely for the reason that the prosecution in the person of Mr. T. Pico failed to prove any of the state's allegations and for no other reason. Neither Hall nor any of his witnesses ever testified at trial. There is no evidence anywhere in the record to the contrary. The plaintiff-appellee has made repeated, false statements concerning the circumstances of the acquittal without a shred of supporting evidence.

In order to obfuscate and to attempt to deceive the lower court, the plaintiff-appellant attached the former defendants' written motions for acquittal from 1981 and 1982 that failed. By the time the 1984 trial had commenced, considerable research and medical evidence had been accumulated, and the substantial changes had been made with regard to both the approach and substance of the defense. The prosecution never heard that information since it was never used. Acquittal was entered at trial in 1984 after a *verbal* motion when it became obvious that the prosecution could not prove any of their allegations. The written motions from 1981 and 1982 had nothing to do with the acquittal in 1984. If a written motion from 1984 had existed with regard to diminished capacity, the plaintiff-appellee would have attached it to its memorandum. No such document exists. No trial record supports Mr. Pico's self-serving affidavit. That is one reason the former defendant-appellant moved to strike the memorandum, Mr. Pico's affidavit and the attached exhibits.

The memorandum statement is a flagrant Rule 11 violation. The order of acquittal (Appendix "A") states, "the Court having granted Defendant's oral motion for Judgment of Acquittal," found Hall acquitted and

not guilty of all charges. Nothing in that order specifies that Hall was acquitted by reason of diminished capacity. Mr. Pico desperately wants to believe that happened but there is no proof to substantiate his attempt to re-write the record. His affidavit is hearsay and is not on personal knowledge since he did not make the motion and he did not enter the order of acquittal. The former defendant-appellant requests that this court take judicial notice of Exhibit "A" attached to the November 4, 1987 Second Memorandum in Support of Motion to Seal, memorandum, p. 6. Hall was acquitted period.

VII.

CONCLUSION

Justice and a certain amount of wisdom suggests that there is a time to practically and legally restore a former criminal defendant's constitutional and statutory privacy rights. That time is lone past due for Hall.

DATED: Honolulu, Hawaii, February 22, 1988.

/s/ Robert W. Hall
Pro Se

APPENDIX F

IN THE CIRCUIT COURT OF
THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII

vs.

ROBERT W. HALL,

Defendant.

CR. No. 54323

AFFIDAVIT OF THOMAS PICO AND EXHIBIT "A"
NON-HEARING MOTION (ACQUITTAL ENTERED
ON JUNE 18, 1984)

AFFIDAVIT OF THOMAS PICO AND EXHIBIT "A"

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HAWAII)

THOMAS PICO, being first duly sworn on oath, deposes and says:

1. I am a resident of the State of Hawaii and am a Deputy Prosecutor of the City and County of Honolulu, and have been so at all times relevant hereto. In 1984, I was assigned to and did in fact represent as a Deputy Prosecutor the interests of the the State of Hawaii at the trial in this action. The facts stated below are based on my personal knowledge.

2. Attached to this Affidavit as Exhibit "A" is a true copy of the Supreme Court of Hawaii's opinion in

this action, *Hall v. State of Hawaii,* 66 Haw. 300 (1903). In that opinion, the Court states that "On May 16, 1980 at the Waikiki Yacht Club, appellant [Robert W. Hall] fired a gun wildly into a crowd of people, hitting three people below the waist and narrowly missing a fourth." *Id.* at 301. At the trial of this matter, these facts were proven on the State's opening case, and in fact, because defendant Hall had admitted shooting into the crowd, and had been caught doing so, and numerous witnesses would testify to the same, the acts of which the State complained were not disputed and the entire trial focused upon whether under the law the defendant had the capacity at the time the shooting occurred to be deemed sufficiently competent to be held responsible for the shooting under the criminal laws of the State of Hawaii. The State of Hawaii, on its opening case, and in my professional judgment, submitted evidence from which a reasonable jury could have concluded that the defendant Hall was capable of committing the crimes of which he was charged, *e.g.,* attempted murder.

3. At the close of the State's opening case in the trial herein, the defendant moved for a verdict of acquittal on the basis of his lack of capacity at the time he shot his firearm into the crowd at the Waikiki Yacht Club. Despite my vigorous protests on behalf of the State that granting said motion would misapply the standard of review and procedures on such a motion, State Circuit Judge Patrick Yim granted the motion and for that reason Robert Hall was acquitted and escape incarceration.

Further affiant sayeth naught.

/s/ Thomas Pico

Subscribed and sworn to
before me this 26th day
of October, 1987.

/s/ Susann L. Pang
Notary Public, State of Hawaii
My Commission Expires: 10/14/89

Supreme Court, U.S.
FILED
SEP 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-212

In The

Supreme Court of the United States

October Term, 1988

Robert W. Hall,

Appellant,

v.

State of Hawaii, University of Hawaii, The William S. Richardson School of Law, Albert J. Simone, Stephen G. Bess, Gladys A. Brandt, Gregory Dela Cruz, Julia Frohlich, Robert M. Fujimoto, James G. Gary, Daniel M. Ishii, Kenneth N. Kato, Stanley Y. Mukai, Walter R. Steiger, Burt S. Tsuchiya, Robin Campaniano, Marvin J. Anderson, Richard S. Miller, Judith M. Kirkendall, William B.C. Chang, Irene Rypinski, Lawrence H. Kam, Bode Uale, Willie Domingo, Dean Kauka, Jeremy T. Harrison, James H. Dannenberg, Ronald C. Brown, and John E. Pickron,

Appellees.

ON APPEAL FROM THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

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APPELLANT'S REPLY TO MOTION TO DISMISS OR AFFIRM

Mandatory appellate jurisdiction

The basic case for jurisdiction was well argued in the jurisdiction brief and will not be repeated. One jurisdictional point the appellees made is worth discussing.

The appellees argue (Motion to Dismiss or Affirm, p. 15), " . . . appellant's basis for mandatory jurisdiction is at the least doubly flawed, for there is no indication in the record that appellant preserved his appeal to this Court by making the 'explicit and timely insistence,' throughout the state trial court proceedings and on appeal to the state Court of Appeals, that 'a state statute, as applied, is repugnant to the federal Constitution, treaties or laws.' The appellees incorrectly argue that the first time the issue was raised was in the petition for certiorari in the Supreme Court of Hawaii. (*See*, Appellant's Jurisdictional Statement, pp. 6-9 for a detailed listing of the federal issues raised from the filing of the Amended Complaint). The appellant also argued a new, surprise federal issue with regard to federal rights in the certiorari petition that could not have been raised earlier.

A look at the record shows what happened. The state circuit court granted summary judgment on the basis of (Appellee's Motion to Dismiss or Affirm, Appendix, pp. A-3, 4), "the arguments advanced at hearing, the memoranda and evidence filed herein, and the records and previous orders herein and in *Hall v. State of Hawaii*, No. 84-1072 . . . affidavits submitted in connection with the motions" and found that "plaintiff has not sufficiently set forth what admissible evidence giving rise to a genuine issue of fact would be produced by additional discovery" and that "the Amended Complaint fails to state a claim

upon which relief can be granted, and, in any event, within the meaning of Rule 56, Hawaii R. Civ. P., there are no material facts in dispute and Defendants are entitled to judgment as a matter of law."

The Hawaii Intermediate Court of Appeals ("ICA") changed horses in the middle of the stream by simply ignoring the circuit court's findings. The ICA dismissed pursuant to the doctrine of res judicata, a finding not found in the circuit court order (see, Appellant's Jurisdictional Statement, App. 1-19). The appellant properly argued the order on appeal. The Hawaii ICA simply blindsided and bushwhacked the pro se appellant with a surprise basis for dismissal. The first opportunity the appellant had to argue the surprise, unprecedented (in Hawaii as applied) res judicata issue was in the petition for certiorari. The reason for this extraordinary switch is found in the Hawaii ICA decision (App. 17-18). The appellant applied to the law school three successive academic years. The federal court action was filed shortly after the denial of the first application for admission. The later state court action included the denial of admission over three academic years.

The appellant posed a difficult problem to the Hawaii ICA with regard to the second and third academic year applications. The creative solution found by the Hawaii ICA that is the subject of this appeal, was to simply ignore the circuit court order. The Hawaii ICA ignored the fact that the appellant had no choice but to argue the actual judgment on appeal. There was no oral Hawaii ICA argument and no prior clue with regard to the switch. The fact that the litigant was pro se was of no consequence to the Hawaii ICA.

The Hawaii ICA failed to enlighten the appellant as to how he could have pursued his second and third year claims in federal court with regard to events that had not yet happened. The federal district court would have dismissed them anyway on Eleventh Amendment grounds. The Hawaii ICA also failed to show that application of H.R.S. Chapter 91 would not have turned the entire action upside down in favor of the appellant.

By any measure, the Hawaii ICA ran roughshod over the procedural due process and federal right of access to the courts and the Hawaii Supreme Court refused to intervene. The federal district court's Eleventh Amendment dismissal placed a federal burden on the Hawaii courts that has not been discharged according to federal law. The Hawaii courts had original jurisdiction over the state and federal claims involving the second and third academic years, and over the state claims involving the first academic year. No trial was ever held, no discovery was ever allowed, and no court ever made any finding with regard to the H.R.S. Chaper 91 allegation. The Chaper 91 allegation, a key allegation, is in legal limbo.

Res judicata

The appellees would have this court believe that when a state court applies res judicata to a federal case dismissed on jurisdictional grounds, the refusal of state court adjudication is simply an "application of settled preclusion principles" despite the fact that the federal action covers only one academic year while the state action covers three academic years (Appellee's Motion to Dismiss or Confirm, p. 13). The appellant argues that the appellees' position is repugnant to federal law.

Two key issues were not settled in federal district court pursuant to federal law. The first was the issue of the application of state law including Chapter 91, H.R.S., Hawaii Administrative Procedures Act, and the second was the veracity of affiants. The federal district court found that the University of Hawaii was an agency of state government and then dismissed on eleventh amendment grounds without lifting the protective orders.

The appellant alleged in both the state and federal actions that none of the University of Hawaii's admissions rules, regulations and procedures used to deny the appellant admission had ever seen the light of day with regard to the Hawaii mandatory requirement of public notice and hearing prior to lawful adoption and application. The failure of the University of Hawaii School of Law to meet Chapter 91 requirements means that all the admissions rules, regulations and procedures used to deny the appellant admission are null and void pursuant to Chapter 91. Even if every false statement the appellees have told about the appellant were true (and they are not true), the appellees have no lawful rules, regulations and procedures to deny the appellant's applications for admission. The appellees have acted entirely outside of all applicable law. The p. 26 "internal exception" argument is absurd in the absence of proof that Hall was either a state employee or an admitted student. The appellant was neither. Hall was taxpaying citizen on the outside looking in on a very cozy, politicized, discriminatory, admissions process using federal and state funds.

The state administration (the appellees and the Hawaii ICA), the most centralized and powerful state administration in the nation, knew it would lose on the

Chapter 91 issue so the Hawaii ICA chose the only other avenue left open. The Hawaii ICA ignored the facts contained in the appellant's amended complaint, the appellant's affidavits, and the Chapter 91 issue. The Hawaii ICA simply dismissed on procedural grounds. The problem was that there were no procedural grounds so the Hawaii ICA manufactured one that sets an astonishing precedent and happens to run roughshod all over the appellant's federal rights.

Why didn't the appellant appeal the federal appeal decision?

When the appellant analyzed the Ninth Circuit decision it appeared that a case could be made that the state courts had jurisdiction over the state law issues pursuant to recent Supreme Court Eleventh Amendment decisions. That point did not appear to be appealable. Since the state law issues were controlling (particularly the Chapter 91 issue), the state court as a court of general jurisdiction had a subsequent obligation to review on the basis of new evidence, the federal issues in light of a favorable state court decision on the controlling state law issues. The federal court made its findings on the basis of protected affidavits. The findings have no basis at all if and when a favorable decision is made on the state law Chapter 91 issue. One alternative would have been a federal court Rule 60(b) action after a favorable state law determination on the controlling state law issues if the state courts failed to review the federal issues in light of new evidence. A Supreme Court Appeal was not yet ripe since the federal court simply told the appellant to go to state court. The pro se appellant did as he was told.

The appellant could not have foreseen that the state court would find and action dismissed in federal court on jurisdictional grounds subject to the doctrine of res judicata. The correct, timely appeal route open to the appellant is the one now before this court.

When the law is against you, attack the person!

In the absence of a sufficient legal argument, the appellees simply smeared the appellant from the outset of both the state and federal actions and again in this appeal with classic, straight from the gutter character assassination. The appellees know that law school actions are not favored in the state or federal courts so they take the low risk route of simply lying in affidavits over the appellant's strenuous and exhaustive motions and objections. Two of those affidavits were slipped into the appendix of the instant motion (C-26 & C-32). At all times the courts have denied the appellant all discovery or deposition access to any potential witness including all affiants.

There is no legally admissible evidence in the record of either the state or federal action to support any of the claims that the appellant was acquitted for any reason other than the fact that the prosecutor (affiant Mr. Pico) failed to prove any of the charges against the appellant. As proof of the falsity of the affidavits, the appellant filed his acquittal order in both the state and the federal actions. The appellant was acquitted at trial without qualifications or exceptions of any kind. The appellant was acquitted before the last prosecution witness had finished testifying, without the necessity of the appellant or any of his witnesses testifying at trial. Mr. Pico's affidavit is a

sour grapes attempt to re-write history and prejudice this action in the process.

The appellees have never bothered to explain how a clear acquittal of all charges without any exceptions or qualifications whatsoever, acts as a bar to an education under any state or federal law. The way the judicial system actually works, the appellees did not have to explain anything. The shock value of completely unproven allegations was enough to impress every lower court. The appellees hope that the Supreme Court will be similarly impressed. In order to support an appearance of credibility, the appellees quoted from a 1983 Hawaii Supreme Court *preliminary motion appeal decision* (66 Haw. 300 [1983]) that involves statements and allegations which have all subsequently been thrown out of court with the appellant's complete and unqualified acquittal. If the order of acquittal had actually supported any of Mr. Pico's self serving lies, the appellees would have filed a copy of the order with this court; they filed everything else.

The smoothest lie by omission the appellees have told is the one of "pathological intoxication" in the hope that the court will picture the appellant as a hopeless drunk. The 66 Haw. 300 (1983) Supreme Court decision simply gave the appellant the right to defend himself under Hawaii's "pathological intoxication" law on the basis of *sulfite poisoning*. There was never any evidence anywhere that the appellant was intoxicated by alcohol. For some reason the appellees forgot to mention sulfites in their motion. This case is a classic case of not simply kicking a man when he is down, but making certain he will never get up as well.

Additional proof that the appellees persist in lying to by omission is found on App. 27 of the appellant's jurisdictional statement. That page is from the Ninth Circuit's appeal decision where the court found, "He had a grade point average (GPA) of 3.82 . . . " out of 4.00. That GPA figure came right off the appellant's official, undergraduate degree, accredited, certified university transcript introduced into evidence in both the state and federal actions. The appellant earned his undergraduate degree in 1984.

In the alternative to the Chapter 91 argument, the plaintiff addressed each and every allegation with regard to the appellant's personal record in the amended complaint. As an example, the appellees lied by omission by failing to note that the University of Hawaii has a specific, written regulation that precludes the use of courses or grades of courses more than 10 years old for transfer credit. The University of Hawaii turned down an earlier request by the appellant for credit consideration of the appellant's 30 year old courses and grades. The appellees had the gall, however, to use 30 year old courses against the appellant in order to keep the appellant from obtaining an education despite the fact that University regulations prohibit them from doing so. Strange the appellees do not mention this. While the litigation has been crawling forward the appellant has earned a master's degree in counseling psychology successfully completing all his courses the first time around. The appellees have tried desperately to give the impression that the appellant is not bright enough to make it in law school in order to suggest that even if the appellant were to prevail with his appeal, the whole exercise would be a waste of time. The

pleadings and the appellant's affidavits make it clear that the appellant disputes any allegation that he was not numerically qualified for acceptance with or without a favorable Chapter 91 adjudication.

Respecfully submitted,

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